CUSTOMS BULLETIN AND DECISIONS

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and

U.S. Court of International Trade

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 4, 19, 24, 101, 103, 111, 112, 113, 118, 122, 127, 141, 142, 146, and 174

(T.D. 95–77)

RIN 1515–AB84

TECHNICAL CORRECTIONS REGARDING CUSTOMS ORGANIZATION; BASIC FORMAT

AGENCY: Customs Service, Treasury.

ACTION: Interim rule.

SUMMARY: This document amends the Customs Regulations to reflect Customs new organizational structure. The revisions are nonsubstantive or merely procedural in nature.

DATES: These changes are effective at 11:59 p.m., EST on September 30, 1995. Comments must be received on or before November 27, 1995.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, NW., Washington, DC 20229. Comments submitted may be inspected at Franklin Court, 1099 14th Street, NW—Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jerry Laderberg, Office of Field Operations (202) 927–0415; Gregory R. Vilders, Attorney, Regulations Branch (202) 482–6930.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In its continuing efforts to achieve more efficient use of its personnel, facilities, and resources, to provide better services to carriers, importers, and the public in general, Customs is changing the structure of its organization both in the field and at Headquarters.

The current organizational structure is the result of reorganizations of the Customs Service by the President's Reorganization Plan No. 1 of

1965 and Reorganization Plan No. 2 of 1973; Headquarters reorganizations of 1979 and 1990; and a Regional consolidation in 1982.

The present reorganization is prompted by a number of changes within Customs and its operating environment: the tremendous growth in our workload; the size of the organization; the growth in administrative and overhead positions; changes in technology; new requirements placed on the agency; changes in trade and travel patterns; and unnecessary layers and barriers in the organization that have grown over time. Creating an organizational structure that addresses these current problems facilitates a move to process-oriented management, which allows adaptation to an environment of continuous change.

In the Fall of 1993, Customs began a study of its organizational structure. During the study, comments and suggestions were received from Customs Headquarters and field offices, the Treasury Department, the National Treasury Employees Union, consultants, trade organizations, and other government agencies. At the completion of the study in the Spring of 1994, a report entitled "People, Processes, & Partnerships: A Report on the Customs Service for the 21st Century" was issued which recommended that Customs reduce its management layers in the field and reorganize its Headquarters functions. As a result of the study, Customs has determined to reorganize from the ground up, with the ports of entry serving as the foundation.

Districts and regions will, for the most part, be eliminated. They will still exist as geographical descriptions for limited purposes such as for broker permits and certain cartage and lighterage purposes. The ports of entry now will be empowered with most of the functions and authority that have been held in the district and regional offices. Some ports will be designated as service ports, and will have a full range of cargo processing functions, including inspection, entry, collection, and verification. Headquarters will also be reorganized. The full reorganization will be effective at 11:59 p.m., EST on September 30, 1995.

Customs is also creating twenty Customs Management Centers (CMCs), which will report to the Assistant Commissioner of Field Operations at Customs Headquarters. While these CMCs will provide oversight of the core business processes at the ports of entry within their respective geographic areas, they will not play a substantive role in the trade community's interaction with Customs. They will not be a formal level of appeal for external matters; their most important function will be to ensure that Customs delivers high quality uniform service at the ports.

Five Strategic Trade Centers (STCs), each with a defined area of responsibility, are also created in the reorganization to enhance Customs capacity to address major trade issues, such as textile transshipments, valuation, antidumping, and the enforcement of intellectual property rights.

Because the CMCs and STCs will not have direct contact with the public, Customs is not including any reference to these organizational entities in the regulations.

The current regulations contain a significant number of references (over 2,000) to organizational entities which will no longer exist or which will have a different functional context on October 1, 1995. Accordingly, regulatory references to "district directors", "regional commissioners", etc., are replaced with "port directors", "Assistant Commissioner", etc., to reflect the new field and Headquarters structure of Customs and where decisional authority will now lie. The changes set forth in this document are nonsubstantive or merely procedural in nature.

In a separate technical correction document published in today's Federal Register, changes are made throughout Chapter 1 of the Customs Regulations to reflect the reorganization. This document serves to revise certain sections contained in 15 Parts of the Customs Regulations (parts 4, 19, 24, 101, 103, 111, 112, 113, 118, 122, 127, 141, 142, 146, and 174) which are either obsolete or require such extensive rewriting that they cannot be presented in the column format adopted in the other technical correction document.

Discussion of Amendments

In Part 4, 13 footnotes (footnotes 2, 21, 29, 63, 64, 66, 68, 69, 73, 90, 93, 94, and 100) are removed which reference the field term "collector" of Customs, an obsolete position, and applicable statutory text is added where appropriate to §§ 4.1(c)(2), 4.9(c), 4.31(a), and 4.61(b)(6) and (23). Also, § 4.14(c) is revised to remove references to regional field positions, and § 4.24(f) is revised to replace references to Regional Commissioners with references to the Director of the service port (a new organizational entity, defined at § 101.1) located nearest to the port of entry.

In Part 19, a parenthetical reference to a definition of "district" found at § 112.1 is added to § 19.44(g).

In Part 24, a parenthetical reference to a definition of "district" found at § 111.1 is added to § 24.1(a)(3)(i), and the third sentences of paragraph (a) and subparagraph (c)(1) of § 24.4 are removed because there is no longer a necessity for importers to identify different ports in the application to defer payment of estimated import taxes on alcoholic beverages within districts, since districts are no longer part of Customs organization. Also, a similar requirement for district directors to notify other ports in his district is removed from § 24.4(d)(1) for the same reason.

In Part 101, § 101.1 is amended by removing the definitions of the terms "area", "Customs district" and "Customs region", adding a definition for the term "service port", and revising the second, and third and fourth parenthetical sentences of the definition of "Port and port of entry", which concerns the Virgin Islands. The section heading and headings and text to § 101.3 paragraphs (a) and (b) are revised, the lists

of Customs ports at § 101.3(b) and Customs stations at § 101.4(c) are rearranged to list the Customs ports alphabetically by State, rather than by regions, and in § 101.3 a new list of Customs service ports similarly arranged by State is added. Lastly, § 101.6(e) is amended by removing the parenthetical words "and are approved by the Commissioner of Customs", and by removing the last sentence, to reflect that port directors now set the hours for Customs services performed outside their port's offices.

In Part 103, § 103.1 is revised concerning the location of public reading rooms by removing the references to Customs Regions.

In Part 111, definitions of "district", "district director" and "region" are added at § 111.1 to enable the current statutory broker licensing and permitting schemes to operate. Section 111.13(f), concerning broker examination notification, § 111.19(d), concerning review of district directors' recommendations to grant/deny a waiver by the Regional Commissioner, and § 111.23(e)(3), concerning notification between regions, are removed as unnecessary or no longer applicable, as is the provision in § 111.45(c), concerning forwarding a copy of the revocation of broker's license to the district director.

In Part 112, a definition of "district" is added at § 112.1 to reflect that for certain purposes regarding carriage of merchandise the "district" concept is still applicable. A parenthetical reference to the definition of "district" at § 112.1 is added to § 112.2(b).

In Part 113, § 113.37 is amended at paragraph (a) to remove a sentence concerning the Department distribution of a Circular to district directors, and at paragraph (g)(2) to revise the text regarding the filing of corporate surety power of attorney documents at district offices. Section 113.38 is amended to remove paragraph (c)(2) because with the removal of regional commissioners this provision no longer has application, and the subparagraphs thereafter ((c)(3)–(7)) are redesignated ((c)(2)–(6)). In § 113.39(a), the last sentence of the introductory text is deleted for the same reason.

In Part 118, a parenthetical reference to the definition of "district" at § 112.1 is added to § 118.4(g) and (l).

In Part 122, § 122.14(e) is amended by removing the second sentence, which concerns appeals to the Commissioner of denials of landing rights, and § 122.31(b) is amended by removing the third and fourth sentences, which concern the filing of scheduled airline schedules with Regional Commissioners and a 30-day notice requirement; none of these provisions are necessary under the reorganized field structure.

In Part 127, § 127.22 is revised to remove references to district headquarters ports.

In Part 141, the provisions of § 141.45 are revised concerning the filing of certified copies of power of attorney documents.

In Part 142, §§ 142.13 and 142.25 are similarly amended to move to new subparagraph (a)(4) what is currently set forth in paragraph (b). This change gives port directors the authority to require that entry

summary documentation be filed and that estimated duties, if any, be deposited at the time of entry before the merchandise is released, if the importer is substantially or habitually delinquent in payment of Customs bills.

In Part 146, a parenthetical reference to the definition of "district" at § 112.1 is added to §§ 146.4(h) and 146.40(b).

In Part 174, § 174.1 is amended by removing paragraph (a), which pertains to district directors.

COMMENTS

Before adopting these interim regulations as final regulations, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, 1099 14th Street, NW—Suite 4000, Washington, DC.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Pursuant to 5 U.S.C. 553(a)(2) and (b)(B), public notice is inapplicable to these interim regulations because they concern matters relating to agency management and personnel. Further, inasmuch as these amendments merely advise the public of Customs new field and Headquarters organization which will be in effect October 1, 1995 (the beginning of the fiscal year), good cause exists for dispensing with notice and public procedure thereon as unnecessary. For the same reasons, it is determined that good cause exists under the provisions of 5 U.S.C. 553(d)(2) and (3) for dispensing with the requirement for a delayed effective date. Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Attorney, Office of Regulations and Rulings, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 4

Customs duties and inspection, Entry, Exports, Imports, Inspection, Reporting and recordkeeping requirements.

19 CFR Part 19

Bonds, Customs duties and inspection, Exports, Freight, Imports, Reporting and recordkeeping requirements, Surety bonds, Warehouses.

19 CFR Part 24

Customs duties and inspection, Financial and accounting procedures, Harbors, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 101

Customs duties and inspection, Customs ports of entry, Exports, Imports, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

19 CFR Part 103

Customs duties and inspection, Customs ports of entry, Exports, Imports, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

19 CFR 111

Administrative practice and procedure, Bonds, Brokers, Customs duties and inspection, Imports, Licensing, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 112

Administrative practice and procedure, Bonds, Common carriers, Customs duties and inspection, Exports, Freight forwarders, Imports, Licensing, Motor carriers, Reporting and recordkeeping requirements.

19 CFR Part 113

Bonds, Customs duties and inspection, Freight, Imports, Reporting and recordkeeping requirements.

19 CFR Part 118

Customs duties and inspection, Examination stations, Imports, Licensing, Reporting and recordkeeping requirements.

19 CFR Part 122

Administrative practice and procedure, Air carriers, Customs duties and inspection, Imports, Reporting and recordkeeping requirements.

19 CFR Part 127

Customs duties and inspection, Merchandise (unclaimed or abandoned), Reporting and recordkeeping requirements.

19 CFR Part 141

Bonds, Customs duties and inspection, Entry of merchandise, Reporting and recordkeeping requirements.

19 CFR Part 142

Customs duties and inspection, Entry procedures, Reporting and recordkeeping requirements.

19 CFR Part 146

Bonds, Customs duties and inspection, Entry, Exports, Foreign trade zones, Imports, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 174

Administrative practice and procedure, Customs duties and inspection, Imports.

AMENDMENTS TO THE REGULATIONS

For the reasons given above, parts 4, 19, 24, 101, 103, 111, 112, 113, 118, 122, 127, 141, 142, 146, and 174 of the Customs Regulations (19 CFR Parts 4, 19, 24, 101, 103, 111, 112, 113, 118, 122, 127, 141, 142, 146, and 174) are amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C.App. 3, 91;

* * * * * * *

2. Part 4 is amended by removing and reserving footnotes 2, 21, 29, 63, 64, 66, 68, 69, 73, 90, 93, 94, and 100; and removing the superscript footnote-referencing designations 2, 21, 29, 63, 64, 66, 68, 69, 73, 90, 93, 94, and 100 from the text.

3. In § 4.1, paragraph (c)(2) is amended by adding to the end, before the period, the parenthetical reference "(19 U.S.C. 1433)".

4. In § 4.9, paragraph (c) is amended by adding the following sentences at the end:

§ 4.9 Formal entry.

* * * * * * *

(c) * * *. It shall not be lawful for any foreign consul to deliver to the master of any foreign vessel the register, or document in lieu thereof, deposited with him in accordance with the provisions of section 434 of this Act until such master shall produce to him a clearance in due form from the director of the port where such vessel has been entered. Any consul offending against the provisions of this section shall be liable to a fine of not more than $ 5,000. (Tariff Act of 1930, section 438, as amended; 19 U.S.C. 1434).

5. In § 4.14, subparagraphs (c)(1) and (2) are revised to read as follows:

§ 4.14 Foreign equipment purchases by, and repairs to, American vessels.

* * * * * * *

(c) *Remission or refund of duty*—(1) *Vessel repair liquidation units.* Vessel Repair Liquidation Units (VRLUs) are located in New York, New York; New Orleans, Louisiana; and San Francisco, California. The New York unit processes and liquidates vessel repair entries filed at ports on the Great Lakes and on the Atlantic Coast of the U.S. north of, but not including Norfolk, Virginia. The New Orleans unit processes and liquidates vessel repair entries filed at ports on the Atlantic Coast of the U.S.

from Norfolk, Virginia, southward, and all U.S. ports on the Gulf of Mexico, including ports in Puerto Rico. The San Francisco unit processes and liquidates vessel repair entries filed at all ports on the Pacific Coast of the U.S., including those in Alaska and Hawaii. After entries are processed and liquidated, bulletin notices of liquidation are returned to original ports of entry for posting.

(2) *Authority.* In cases in which both clearly applicable Headquarters precedent exists, and the resulting refund or remission of duty will be less than $ 50,000, the proper VRLU may approve or deny Applications for Relief. In cases in which clearly applicable precedent does not exist, or the resulting refund or remission will be $ 50,000 or greater, the Application for Relief will be referred for action to the Entry and Carrier Rulings Branch, Customs Headquarters.

* * * * * * *

6. In § 4.24, paragraph (f) is amended by revising the text to read as follows:

§ 4.24 Application for refund of tonnage tax.

* * * * * * *

(f) The owner or operator of the vessel involved, or other party in interest, may file with the port Director a petition addressed to the Commissioner of Customs for a review of the port director's decision on an application for refund of regular tonnage tax. Such petition shall be filed in duplicate within 30 days from the date of notice of the initial decision, shall completely identify the case, and shall set forth in detail the exceptions to the decision.

* * * * * * *

7. In § 4.31, paragraph (a) is amended by adding to the end of the first sentence, before the period, the words ", regarding such accident, stress of weather, or other necessity".

8. In § 4.61, subparagraph (b)(6) is amended by adding to the end, before the period, the parenthetical reference "(46 U.S.C.App. 97)"; and subparagraph (b)(19) is amended by adding to the end, before the period, the parenthetical reference "(46 U.S.C.App. 100)".

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The general authority citation for Part 19 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624;

* * * * * * *

2. In § 19.44, paragraph (g) is amended by adding the parenthetical words "(see definition of "district" at § 112.1)" following the words "boundaries of the district".

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for part 24 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1450, 1624; 31 U.S.C. 9701, unless otherwise noted.

2. In § 24.1, subparagraph (a)(3)(i) is amended by adding the parenthetical words "(see definition of "district" at § 111.1)" following the words "not licensed in the district".

3. In § 24.4, paragraph (a) and subparagraph (c)(1) are amended by removing the third sentence; and subparagraph (d)(1) is amended by removing the words "and will at the same time notify all ports in his district at which the procedure will be used according to the importer's application".

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. Section 101.1 is amended by removing paragraphs (a)–(c); removing the paragraph designations for all remaining definitions and placing them in appropriate alphabetical order; adding, in appropriate alphabetical order, the definition of a "service port"; and revising the second sentence, and third and fourth parenthetical sentences of the definition of "Port and port of entry". The addition and revisions to read as follows:

§ 101.1 Definitions.

* * * * * * *

Service port. The term "service port" refers to a Customs location having a full range of cargo processing functions, including inspections, entry, collections, and verification. *Port and port of entry.* * * * The terms "port" and "port of entry" incorporate the geographical area under the jurisdiction of a port director. (The Customs ports in the Virgin Islands, although under the jurisdiction of the Secretary of the Treasury, have their own Customs laws (48 U.S.C. 1406(i)). These ports, therefore, are outside the Customs territory of the United States and the ports thereof are not "ports of entry" within the meaning of these regulations).

3. Section 101.3 is amended by revising the section heading; revising the heading and text of paragraph (a); and, revising paragraph (b) to read as follows:

§ 101.3 Customs service ports and ports of entry.

(a) *Designation of Customs field organization.* The Deputy Assistant Secretary (Regulatory, Tariff, and Trade Enforcement), pursuant to authority delegated by the Secretary of the Treasury, is authorized to establish, rearrange or consolidate, and to discontinue Customs ports of entry as the needs of the Customs Service may require.

(b) *List of Ports of Entry and Service Ports.* The following is a list of Customs Ports of Entry and Service Ports. Many of the ports listed were created by the President's message of March 3, 1913, concerning a reorganization of the Customs Service pursuant to the Act of August 24, 1912 (37 Stat. 434; 19 U.S.C. 1). Subsequent orders of the President or of the Secretary of the Treasury which affected these ports, or which created (or subsequently affected) additional ports, are cited following the name of the ports.

(1) *Customs ports of entry.* A list of Customs ports of entry by State and the limits of each port are set forth below:

Ports of entry	Limits of port
Alabama	
Birmingham	
Huntsville	T.D. 83–196
Mobile	including territory described in T.D. 76–259
Alaska	
Alcan	T.D. 71–210
Anchorage	T.D.s 55295 and 68–50
Dalton Cache	T.D. 79–74
Fairbanks	E.O. 8064, Mar. 9, 1939 (4 FR 1191)
Juneau	
Ketchikan	including territory described in T.D. 74–100
Sitka	including territory described in T.D. 55609
Skagway	
Valdez	including territory described in T.D. 79–201
Wrangell	including territory described in T.D. 56420
Arizona	
Douglas	including territory described in E.O. 9382, Sept. 25, 1943 (8 FR 13083)
Lukeville	E.O. 10088, Dec. 3, 1949 (14 FR 7287)
Naco	
Nogales	including territory described in T.D. 77–285
Phoenix	T.D. 71–103
San Luis	E.O. 5322, Apr. 9, 1930
Sasabe	E.O. 5608, Apr. 22, 1931
Tucson	including territory described in T.D. 89–102
Arkansas	
Little Rock-North Little Rock	T.D. 70–146. (Restated in T.D. 84–126).
California	
Andrade	E.O. 4780, Dec. 13, 1927
Calexico	
Eureka	
Fresno	including territory described in T.D. 74–18
+ Los Angeles-Long Beach	including territory described in T.D. 78–130
Port Hueneme	T.D. 92–10
Port San Luis	
San Diego	T.D. 85–163
+ San Francisco-Oakland	including Benicia, Martinez, Richard, Sacramento, San Jose, and Stockton, T.D. 82–9
Tecate	E.O. 4780, Dec. 13, 1927
Colorado	
Denver	T.D. 80–180

Ports of entry	Limits of port
Connecticut	
Bridgeport	including territory described in T.D. 68–224
Hartford	including territory described in T.D. 68–224
New Haven	including territory described in T.D. 68–224
New London	including territory described in T.D. 68–224
Delaware	
Philadelphia-Chester, PA and Wilmington, DE	included in the consolidated port of Philadelphia-Chester, PA, T.D. 84–195
District of Columbia	
Washington	including territory described in T.D. 68–67
Florida	
Boca Grande	
Fernandina Beach	including St. Mary's, GA; T.D. 53033
Jacksonville	T.D. 69–45
Key West	including territory described in T.D. 53994
+ Miami	including territory described in T.D. 53514
Orlando	T.D. 76–306
Panama City	E.O. 3919, Nov. 1, 1923
Pensacola	
Port Canaveral	including territory described in T.D. 66–212
Port Everglades	E.O. 5770, Dec. 31, 1931; including territory described in T.D. 53514. *Mail:* Fort Lauderdale, FL
Port Manatee	T.D. 88–14
St. Petersburg	E.O. 7928, July 14, 1938 (3 FR 1749); including territory described in T.D. 53994
Tampa	including territory described in T.D. 68–91
West Palm Beach	E.O. 4324, Oct. 15, 1925; including territory described in T.D. 53514
Georgia	
Atlanta	including territory described in T.D. 55548
Brunswick	including territory described in T.D. 86–162
Fernandina Beach, FL	including St. Mary's, GA; T.D. 53033
Savannah	including territory described in E.O. 8367, Mar. 5, 1940 (5 FR 985)
Hawaii	
Hilo	T.D. 95–11
Honolulu	including territory described in T.D. 90–59
Kahului	T.D. 95–11
Nawiliwili-Port Allen	E.O. 4385, Feb. 25, 1926; including territory described in T.D. 56424
Idaho	
Boise	Pub.L. 98–573; T.D. 85–22
Eastport	
Porthill	
Illinois	
+ Chicago	including territory described in T.D. 71–121
Davenport, IA-Moline and Rock Island, IL	T.D.s 86–76 and 89–10
Peoria	including territory described in T.D.72–130
Rockford	T.D. 95–62
Indiana	
Cincinnati, OH -Lawrenceburg, IN	consolidated port, T.D. 84–91
Indianapolis	
Owensboro, KY-Evansville, IN	consolidated port, T.D. 84–91

Ports of entry	Limits of port
Iowa	
Davenport,IA-Moline and Rock Island, IL	T.D.s 86–76 and 89–10
Des Moines	T.D. 75–104
Kansas	
Wichita	T.D. 74–93
Kentucky	
Louisville	including territory described in T.D. 77–232
Owensboro, KY-Evansville, IN	consolidated port, T.D. 84–91
Louisiana	
Baton Rouge	E.O. 5993, Jan. 13, 1933; including territory described in T.D.s 53514 and 54381. (Restated in T.D. 84–126).
Gramercy	T.D. 82–93. (Restated in T.D. 84–126).
Lake Charles	E.O. 5475, Nov. 3, 1930; including territory described in T.D. 54137
Morgan City	T.D. 54682; including territory described in T.D.s 66–266 and 94–77. (Restated in T.D. 84–126).
+ New Orleans	E.O. 5130, May 29, 1929; including territory described in T.D. 74–206. (Restated in T.D. 84–126).
Shreveport-Bossier City	including territory described in T.D. 86–145
Maine	
Bangor	including Brewer, ME, E.O. 9297, Feb. 1, 1943 (8 FR 1479)
Bar Harbor	including Mount Desert Island, the city of Ellsworth, and the townships of Hancock, Sullivan, Sorrento, Gouldsboro, and Winter Harbor and Trenton, E.O. 4572, Jan. 27, 1927, and T.D. 78–130
Bath	including Booth Bay and Wiscasset, E. O. 4356, Dec. 15, 1925
Belfast	including Searsport, E.O. 6754, June 28, 1934
Bridgewater	E.O. 8079, Apr. 4, 1939 (4 FR 1475)
Calais	including townships of Calais, Robbinston, and Baring, E.O. 6284, Sept. 13, 1933
Eastport	including Lubec and Cutler, E.O. 4296, Aug. 26, 1925
Fort Fairfield	
Fort Kent	
Houlton	E.O. 4156, Feb. 14, 1925
Jackman	including townships of Jackman, Sandy Bay, Bald Mountain, Holeb, Attean, Lowelltown, Dennistown, and Moose River, T.D. 54683
Jonesport	including towns (townships) of Beals, Jonesboro, Roque Bluffs, and Machiasport, E.O. 4296, Aug. 26, 1925; E.O. 8695, Feb. 25, 1941 (6 FR 1187)
Limestone	
Madawaska	
Portland	including territory described in E.O. 9297, Feb. 1, 1943 (8 FR 1479)
Portsmouth, N.H.	including Kittery, ME
Rockland	
Van Buren	
Vanceboro	

Ports of entry	Limits of port
Maryland	
Annapolis	
Baltimore	including territory described in T.D. 68–123
Cambridge	E.O. 3888, Aug.13, 1923; Crisfield
Massachusetts	
+ Boston	including territory and waters adjacent thereto described in T.D. 56493
Fall River	including territory described in T.D. 54476
Gloucester	
Lawrence	E.O. 5444, Sept. 16, 1930; E.O. 10088, Dec. 3, 1949 (14 FR 7287); including territory described in T.D. 71–12
New Bedford	
Plymouth	
Salem	including Beverly, Marblehead, and Lynn; including Peabody, E.O. 9207, July 29, 1942 (7 FR 5931)
Springfield	T.D. 69–189
Worcester	
Michigan	
Battle Creek	T.D. 72–233
Detroit	including territory described in E.O. 9073, Feb. 25, 1942 (7 FR 1588), and T.D. 53738
Grand Rapids	T.D. 77–4
Marinette, WI	including Menominee, MI
Muskegon	E.O. 8315, Dec. 22, 1939 (4 FR 4941); including territory described in T.D. 56230
Port Huron	including territory described in T.D. 87–117
Saginaw-Bay City-Flint	consolidated port, T.D. 79–74; including territory described in T.D. 82–9
Sault Ste. Marie	including territory described in T.D. 79–74
Minnesota	
Baudette	E.O. 4422, Apr. 19, 1926
Duluth, MN and Superior, WI	including territory described in T.D. 55904
Grand Portage	T.D. 56073
International Falls-Ranier	including territory described in T.D. 66–246
Minneapolis-St. Paul	including territory described in T.D. 69–15
Noyes	E.O. 5835, Apr. 13, 1932
Pinecreek	E.O. 7632, June 15, 1937 (2 FR 1245)
Roseau	E.O. 7632, June 15, 1937 (2 FR 1245)
Warroad	
Mississippi	
Greenville	T.D. 73–325. (Restated in T.D. 84–126).
Gulfport	
Pascagoula	including territory described in T.D. 86–68
Vicksburg	T.D. 72–123; including territory described in T.D. 93–32. (Restated in T.D. 84–126).
Missouri	
Kansas City	including Kansas City, KS and North Kansas City, MO, E.O. 8528, Aug. 27, 1940 (5 FR 3403); including territory described in T.D. 67–56
Springfield	including all territory within Greene and Christian Counties, T.D. 84–84
St. Joseph	
St. Louis	including territory described in T.D.s 67–57 and 69–224

Ports of entry	Limits of port
Montana	
Butte	T.D. 73–121
Del Bonita	E.O. 7947, Aug. 9, 1938 (3 FR 1965); *Mail*: Cut Bank, MT
Great Falls	
Morgan	E.O. 7632, June 15, 1937 (2 FR 1245); *Mail*: Loring, MT
Opheim	E.O. 7632, June 15, 1937 (2 FR 1245)
Piegan	E.O. 7632, June 15, 1937 (2 FR 1245); *Mail*: Babb, MT
Raymond	E.O. 7632, June 15, 1937 (2 FR 1245)
Roosville	E.O. 7632, June 15, 1937 (2 FR 1245); *Mail*: Eureka, MT
Scobey	E.O. 7632, June 15, 1937 (2 FR 1245)
Sweetgrass	
Turner	E.O. 7632, June 15, 1937 (2 FR 1245)
Whitetail	E.O. 7632, June 15, 1937 (2 FR 1245)
Whitlash	E.O. 7632, June 15, 1937 (2 FR 1245)
Nebraska	
Omaha	including territory described in T.D. 73–228
Nevada	
Las Vegas	including territory described in T.D. 79–74
Reno	including territory described in T.D. 73–56
New Hampshire	
Portsmouth	including Kittery, ME
New Jersey	
Philadelphia-Chester, PA and Wilmington, DE	included in the consolidated port of Philadelphia-Chester, PA, and includes Wilmington, DE, and Camden, Gloucester City, and Salem, NJ, T.D. 84–195
Perth Amboy	
New Mexico	
Albuquerque	including territory described in T.D. 74–304
Columbus	
Santa Teresa	T.D. 94–34
New York	
Albany	
Alexandria Bay	including territory described in E.O. 10042, Mar. 10, 1949 (14 FR 1155)
Buffalo-Niagara Falls	T.D. 56512
Cape Vincent	
Champlain-Rouses Point	including territory described in T.D. 67–68
Clayton	
Massena	T.D. 54834
+ New York	including territory described in E.O. 4205, Apr. 15, 1925 (T.D. 40809)
Ogdensburg	
Oswego	
Rochester	
Sodus Point	
Syracuse	
Trout River	consolidated port includes Chateaugay and Fort Covington, T.D. 83–253
Utica	

Ports of entry	Limits of port
North Carolina	
Beaufort-Morehead City	including territory described in T.D. 87–76
Charlotte	T.D. 56079
Durham	E.O. 4876, May 3, 1928; including territory described in E.O. 9433, Apr. 4, 1944 (9 FR 3761), and T.D. 82–9
Reidsville	E.O. 5159, July 18, 1929; including territory described in E.O. 9433, Apr. 6, 1944 (9 FR 3761)
Wilmington	including townships of Northwest, Wilmington, and Cape Fear, E.O. 7761, Dec. 3, 1937 (2 FR 2679); including territory described in E.O. 10042, Mar. 10, 1949 (14 FR 1155)
Winston-Salem	including territory described in T.D. 87–64
North Dakota	
Ambrose	E.O. 5835, April 13, 1932
Antler	
Carbury	E.O. 5137, June 17, 1929
Dunseith	E.O. 7632, June 15, 1937 (2 FR 1245)
Fortuna	E.O. 7632, June 15, 1937 (2 FR 1245)
Hannah	
Hansboro	
Maida	E.O. 7632, June 15, 1937 (2 FR 1245)
Neche	
Noonan	E.O. 7632, June 15, 1937 (2 FR 1245)
Northgate	
Pembina	
Portal	
Sarles	
Sherwood	
St. John	E.O. 5835, Apr. 13, 1932
Walhalla	
Westhope	E.O. 4236, June 1, 1925
Ohio	
Ashtabula/Conneaut	consolidated port, T.D. 77–232
Cincinnati, OH- Lawrenceburg, IN	consolidated port, T.D. 84–91
Cleveland	including territory described in T.D. 77–232; consolidated port, T.D. 87–123
Columbus	including territory described in T.D. 82–9
Dayton	including territory described in T.D. 76–77
Toledo-Sandusky	consolidated port, T.D. 84–89
Oklahoma	
Oklahoma City	including territory described in T.D. 66–132
Tulsa	T.D. 69–142
Oregon	
Astoria	including territory described in T.D. 73–338
Coos Bay	E.O. 4094, Oct. 28, 1924; E.O. 5193, Sept. 14, 1929; E.O. 5445, Sept. 16, 1930; E.O. 9533, Mar. 23, 1945 (10 FR 3173)
Longview	including territory described in T.D. 73–338
Newport	
Portland	

Ports of entry	Limits of port
Pennsylvania	
Erie	including territory described in T.D. 77–5
Harrisburg	T.D. 71–233
Lehigh Valley	T.D. 93–75
Philadelphia-Chester, PA and Wilmington, DE	consolidated port includes Wilmington, DE, and Camden, Gloucester City, and Salem, NJ, T.D. 84–195
Pittsburgh	including territory described in T.D. 67–197
Wilkes-Barre/Scranton	T.D. 75–64
Puerto Rico	
Aquadilla	
Fajardo	
Guanica	
Humacao	including territory described in T.D. 70–157
Jobos	E.O. 9162, May 13, 1942 (7 FR 3569)
Mayaguez	T.D. 22305
Ponce	including territory described in T.D. 54017
San Juan	including territory described in T.D. 54017
Rhode Island	
Newport	
Providence	including territory described in T.D. 67–3
South Carolina	
Charleston	including territory described in T.D. 76–142
Columbia	including all territory in Richland and Lexington Counties, T.D. 82–239
Georgetown	
Greenville-Spartanburg	T.D. 70–148
Tennessee	
Chattanooga	(Restated in T.D. 84–126).
Knoxville	T.D. 75–128. (Restated in T.D. 84–126).
Memphis	(Restated in T.D. 84–126).
Nashville	(Restated in T.D. 84–126).
Texas	
Amarillo	T.D. 75–129
Austin	T.D. 81–170
Beaumont, Orange, Port Arthur, Sabine	consolidated port, T.D. 74–231; including territory described in T.D. 81–160
Brownsville	including territory described in T.D. 79–254
Dallas-Fort Worth	T.D. 73–297; T.D. 79–232; T.D. 81–170
Del Rio	
Eagle Pass	including territory described in T.D. 91–93
El Paso	T.D. 54407, including territory described in T.D. 78–221
Fabens	E.O. 4869, May 1, 1928
Hidalgo	T.D. 85–164
+ Houston-Galveston	consolidated port includes territory lying within corporate limits of both Houston and Galveston, and remaining territory in Harris and Galveston Counties, T.D.s 81–160 and 82–15; includes Corpus Christi, E.O. 8288, Nov. 22, 1939 (4 FR 4691), and territory described in T.D. 78–130; includes Freeport, E.O. 7632, June 15, 1937 (2 FR 1245); and includes Port Lavaca-Point Comfort, T.D. 56115
Laredo	including territory described in T.D. 90–69
Lubbock	T.D. 76–79
Presidio	E.O. 2702, Sept. 7, 1917

Ports of entry	Limits of port
Texas (continued)	
Progreso	T.D. 85–164
Rio Grande City	including territory described in T.D. 92–43
Roma	E.O. 4830, Mar. 14, 1928
San Antonio	
Utah	
Salt Lake City	T.D. 69–76
Vermont	
Beecher Falls	
Burlington	including town of South Burlington, T.D. 54677
Derby Line	
Highgate Springs/Alburg	E.O. 7632, June 15, 1937 (2 FR 1245); includes territory described in T.D. 77–165
Norton	T.D. 73–249
Richford	
St. Albans	including township of St. Albans, E.O. 3925, Nov. 13, 1923; E.O. 7632, June 15, 1937 (2 FR 1245); T.D. 77–165
Virginia	
Alexandria, VA	T.D. 68–67
Front Royal	T.D. 89–63
Norfolk-Newport News	consolidated port includes waters and shores of Hampton Roads
Richmond-Petersburg	consolidated port, T.D. 68–179
Virgin Islands, U.S.	
Charlotte Amalie, St. Thomas	
Christiansted, St. Croix	
Coral Bay, St. John	
Cruz Bay, St. John	
Frederiksted, St. Croix	
Washington	
Aberdeen	including territory described in T.D.s 56229, 79–169, and 84–90
Blaine	E.O. 5835, Apr. 13, 1932
Boundary	T.D. 67–65
Danville	
Ferry	
Frontier	T.D. 67–65
Laurier	
Lynden	E.O. 7632, June 15, 1937 (2 FR 1245)
Metaline Falls	E.O. 7632, June 15, 1937 (2 FR 1245)
Nighthawk	
Oroville	E.O. 5206, Oct. 11, 1929
Point Roberts	T.D. 78–272
Puget Sound	consolidated port includes Seattle, Anacortes, Bellingham, Everett, Friday Harbor, Neah Bay, Olympia, Port Angeles, Port Towsend, and Tacoma, T.D. 83–146
Spokane	
Sumas	
West Virginia	
Charleston	T.D. 73–170 and including territory described in T.D. 73–212

Ports of entry	Limits of port
Wisconsin	
Ashland	
Duluth, MN and Superior, WI	including territory described in T.D. 55904
Green Bay	including townships of Ashwaubenon, Allouez, Preble, and Howard, and city of De Pere, T.D. 54597
Manitowoc	
Marinette	including Menominee, MI
Milwaukee	including territory described in T.D. 72–105
Racine	including city of Kenosha and townships of Mount Pleasant and Somers, T.D. 54884
Sheboygan	

+ Indicates Drawback unit/office.

(2) *Customs service ports.* A list of Customs service ports and the States in which they are located is set forth below:

State	Service ports
Alabama	Mobile
Alaska	Anchorage
Arizona	Nogales
California	Los Angeles
	LAX
	San Diego
	San Francisco
Colorado	Denver
Florida	Miami
	Tampa
Georgia	Savannah
Hawaii	Honolulu
Illinois	Chicago
Louisiana	New Orleans
Maine	Portland
Maryland	Baltimore
Massachusetts	Boston
Michigan	Detroit
Minnesota	Duluth
	Minneapolis
Missouri	St. Louis
Montana	Great Falls
New Jersey	New York/Newark
New York	Buffalo
	Champlain
	JFK
	New York/Newark
North Carolina	Charlotte
North Dakota	Pembina
Ohio	Cleveland
Oregon	Portland
Pennsylvania	Philadelphia
Puerto Rico	San Juan
Rhode Island	Providence
South Carolina	Charleston
Texas	Dallas
	El Paso
	Houston
	Laredo
Vermont	St. Albans
Virginia	Dulles
	Norfolk

State	Service ports
Virgin Islands	Charlotte Amalie
Washington	Blaine
	Seattle
Wisconsin	Milwaukee

4. In § 101.4, the list of Customs stations at paragraph (c) is amended by revising the list to read as follows:

Customs station	Supervisory port of entry
Alaska	
Barrow	Fairbanks
Dutch Harbor	Anchorage
Eagle	Alcan
Fort Yukon	Fairbanks
Haines	Dalton Cache
Hyder	Ketchikan
Kaktovik (Barter Island)	Fairbanks
Kenai (Nikiski)	Anchorage
Kodiak	Anchorage
Northway	Alcan
Pelican	Juneau
Petersburg	Wrangell
California	
Campo	Tecate
Montery	San Francisco-Oakland
Otay Mesa	San Diego
San Ysidro	San Diego
Colorado	
Colorado Springs	Denver
Delaware	
Lewes	Philadelphia, PA
Florida	
Fort Pierce	West Palm Beach
Green Cove Springs	Jacksonville
Port St. Joe	Panama City
Indiana	
Fort Wayne	Indianapolis
Maine	
Bucksport	Belfast
Coburn Gore	Jackman
Daaquam	Jackman
Easton	Fort Fairfield
Estcourt	Fort Kent
Forest City	Houlton
Hamlin	Van Buren
Maryland	
Salisbury	Baltimore
Massachusetts	
Provincetown	Plymouth

Customs station	Supervisory port of entry
Michigan	
Alpena	Saginaw-Bay City-Flint
Detour	Sault Ste. Marie
Escanaba	Sault Ste. Marie
Grand Haven	Muskegon
Houghton	Sault Ste. Marie
Marquette	Sault Ste. Marie
Rogers City	Saginaw-Bay City-Flint
Minnesota	
Crane Lake	Duluth, MN-Superior, WI
Ely	Duluth, MN-Superior, WI
Lancaster	Noyes
Oak Island	Warroad
Mississippi	
Biloxi	Mobile, AL
Montana	
Wild Horse	Great Falls
Willow Creek	Great Falls
New Jersey	
Atlantic City	Philadelphia-Chester, PA and Wilmington, DE
Port Norris	Philadelphia-Chester, PA and Wilmington, DE
Tuckerton	Philadelphia-Chester, PA and Wilmington, DE, PA
New York	
Cannons Corners	Champlain-Rouses Point
Churubusco	Trout River
Jamieson's Line	Trout River
New Hampshire	
Pittsburg	Beecher Falls, VT
Monticello	Houlton, ME
Orient	Houlton, ME
Ste. Aurelie	Jackman, ME
St. Pamphile	Jackman, ME
New Mexico	
Antelope Wells *(Mail:* Hachita, NM)	Rio Grande City, TX
North Dakota	
Grand Forks	Pembina
Minot	Pembina
Ohio	
Akron	Cleveland
Fairport Harbor	Ashtabula/Conneaut
Lorain	Sandusky
Marblehead-Lakeside	Sandusky
Put-in-Bay	Sandusky
Oklahoma	
Muskogee	Tulsa

Customs station	Supervisory port of entry
Texas	
Amistad Dam	Del Rio
Falcon Dam	Roma
Fort Hancock	Fabens
Los Ebanos	Rio Grande City
Marathon	El Paso
Vermont	
Beebe Plaine	Derby Line
Canaan	Beecher Falls
East Richford	Richford
Newport	Derby Line
North Troy	Derby Line
West Berkshire	Richford

5. In § 101.6, paragraph (e) is amended by removing the parenthetical words "and are approved by the Commissioner of Customs", and the last sentence.

PART 103—AVAILABILITY OF INFORMATION

1. The authority citation for Part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

2. Section 103.1 is amended by removing from the list of Public Reading Rooms the words "Northeast Region—", "New York Region—", "North Central Region—", "Southeast Region—", "South Central Region—", "Southwest Region—", and "Pacific Region—".

PART 111—CUSTOMS BROKERS

1. The general authority citation for Part 111 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624, 1641;

* * * * * * *

2. Section 111.1 is amended by removing the paragraph designations for all definitions and placing them in appropriate alphabetical order, and adding, in appropriate alphabetical order, the definitions of "district" and "district director" to read as follows:

§ 111.1 Definitions.

* * * * * * *

District. "District" means the geographic area covered by a Customs broker permit issued under this Part. A listing of each district, and the ports thereunder, will be published on or before October 1, 1995, and whenever updated.

District director. "District director" means the port director of Customs at the port designated as a district for purposes of this part.

* * * * * * *

Region. "Region" means the geographic area covered by a waiver issued pursuant to § 111.19(d).

* * * * * * *

3. In § 111.13, subparagraph (f) is removed.

4. In § 111.19, subparagraph (d) is amended by removing the last sentence.

5. In § 111.23, subparagraph (e)(3) is removed.

6. In § 111.45, paragraph (c) is amended by removing the third sentence.

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 continues to read as follows:

Authority: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

2. Section 112.1 is amended by removing the paragraph designations for all definitions and placing them in appropriate alphabetical order, and adding, in appropriate alphabetical order, the definition of "district" to read as follows:

§ 112.1 Definitions.

* * * * * * *

District. "District" means the geographic area in which the parties excepted by the last sentence of § 112.2(b)(2) may operate under their bonds without obtaining a cartage or lighterage license issued under this Part. A listing of each district, and the ports thereunder, will be published on or before October 1, 1995, and whenever updated.

* * * * * * *

3. Section 112.2 is amended by adding the parenthetical words "(see definition of "district" at § 112.1)" following the words "district boundaries" wherever they appear.

PART 113—CUSTOMS BONDS

1. The general authority citation for Part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624;

* * * * * * *

2. In § 113.37, paragraph (a) is amended by removing the second sentence; and subparagraph (g)(2) is revised to read as follows:

§ 113.37 Corporate sureties.

* * * * * * *

(g) * * *

(2) *Filing.* The corporate surety power of attorney executed on Customs Form 5297 shall be filed with Customs. The original(s) of the corporate surety power of attorney shall be retained at the port where it(they) was(were) filed.

* * * * * * *

3. In § 113.38, subparagraph (c)(2) is removed and subparagraphs (c)(3)–(7) are redesignated as subparagraphs (c)(2)–(6).

4. In § 113.39, the introductory text of paragraph (a) is amended by removing the second sentence.

PART 118—CENTRALIZED EXAMINATION STATIONS

1. The authority citation for Part 118 continues to read as follows:

Authority: 19 U.S.C. 66, 1499, 1623, 1624.

2. In § 118.4, paragraphs (g) and (l) are amended by adding the parenthetical words "(see definition of "district" at § 112.1)" following the words "district boundaries".

3. Section 118.24 is removed and reserved.

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644; 46 U.S.C.App. 1509.

2. In § 122.14, paragraph (e) is amended by removing the second sentence.

3. In § 122.31, paragraph (b) is amended by removing the third and fourth sentences.

PART 127—GENERAL ORDER, UNCLAIMED AND ABANDONED MERCHANDISE

1. The authority citation for Part 127 continues to read as follows:

Authority: 19 U.S.C. 66, 1311, 1312, 1484, 1485, 1490, 1491, 1492, 1506, 1559, 1563, 1623, 1624, 1646a; 26 U.S.C. 7553.

2. Section 127.22 is revised to read as follows:

§ 127.22 Place of sale.

The port director, in his discretion, may authorize the sale of merchandise subject to sale (including explosives, perishable articles and articles liable to depreciation) at any port. The consignee of any merchandise which is to be transferred from the port where it was imported to another port for sale, shall be notified of the transfer so that he may have the option of making entry of the merchandise before the transfer and sale.

PART 141—ENTRY OF MERCHANDISE

1. The general authority citation for Part 141 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624;

* * * * * * *

2. Section 141.45 is revised to read as follows:

§ 141.45 Certified copies of power of attorney.

Upon request of a party in interest, a port director having on file an original power of attorney document (which is not limited to transactions in a specific Customs location) will forward a certified copy of the document to another port director.

PART 142—ENTRY PROCESS

1. The authority citation for Part 142 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

2. Section 142.13 is amended by adding a new subparagraph (a)(4); by removing paragraph (b); and by redesignating paragraph (c) as paragraph (b). Subparagraph (a)(4) reads as follows:

§ 142.13 When entry summary must be filed at time of entry.

(a) * * *

(4) Is substantially or habitually delinquent in the payment of Customs bills. See § 142.14.

* * * * * * *

3. Section 142.25 is amended by adding a new subparagraph (a)(4); by removing paragraph (b); and by redesignating paragraph (c) as paragraph (b). Subparagraph (a)(4) reads as follows:

§ 142.25 Discontinuance of immediate delivery privileges.

(a) * * *

(4) Is substantially or habitually delinquent in the payment of Customs bills. See § 142.26.

* * * * * * *

PART 146—FOREIGN TRADE ZONES

1. The general authority citation for Part 146 is revised to read as follows:

Authority: 19 U.S.C. 66, 81a–81u, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624;

* * * * * * *

2. In § 146.4, paragraph (h) is amended by adding the parenthetical words "(see definition of "district" at § 112.1)" following the words "district boundaries".

3. In § 146.40, paragraph (b) is amended by adding the parenthetical words "(see definition of "district" at § 112.1)" following the words "in the district".

PART 174—PROTESTS

1. The authority citation for Part 174 continues to read as follows:

Authority: 19 U.S.C. 66, 1514, 1515 1624.

2. Section 174.1 is amended by removing paragraph (a), and removing the paragraph designation for the remaining definition.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: September 11, 1995.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, Septebmer 27, 1995 (60 FR 50008)]

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19 CFR Chapter 1

(T.D. 95–78)

RIN 1515–AB84

TECHNICAL CORRECTIONS REGARDING CUSTOMS ORGANIZATION; SUMMARY FORMAT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim rule.

SUMMARY: This document amends the Customs Regulations to reflect Customs new organizational structure. The changes are nonsubstantive or merely procedural in nature.

DATES: These changes are effective at 11:59 p.m., EST on September 30, 1995. Comments must be received on or before November 27, 1995.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, NW., Washington, DC 20229. Comments submitted may be inspected at Franklin Court, 1099 14th Street, NW—Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jerry Laderberg, Office of Field Operations (202) 927–0415; Gregory R. Vilders, Attorney, Regulations Branch (202) 482–6930.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In its continuing efforts to achieve more efficient use of its personnel, facilities, and resources, and to provide better services to carriers,

importers, and the public in general, Customs is changing the structure of its organization both in the field and at Headquarters.

Customs is now eliminating districts and regions from its field organization to place more emphasis on field operations, especially at the Customs ports of entry, and restructuring to provide better support services for those ports of entry. The current regulations contain a significant number of references (over 2,000) to organizational entities which will no longer exist or which will have a different functional context at 11:59 p.m., EST on September 30, 1995. Accordingly, regulatory references to "district directors", "regional commissioners", etc., are replaced with "port directors", "Assistant Commissioner", etc., to reflect the new field and Headquarters structure of Customs and where decisional authority will now lie. All Parts in Chapter 1 of title 19 of the Code of Federal Regulations are affected in this document except Part 181 which contains the North American Free Trade Agreement regulations that, as adopted in final form with effect from October 1, 1995, will include all appropriate organizational reference changes. The changes set forth in this document are nonsubstantive or merely procedural in nature, pertaining to internal agency operations.

In a separate technical correction document published in today's Federal Register, 15 Parts of the Customs Regulations that contain provisions which require such extensive rewriting that they cannot be presented in the table format employed here are revised. Also, because the BACKGROUND portion of the other technical correction document more fully explains the reasons for the changes reflected in this document, it is equally applicable here.

COMMENTS

Before adopting these interim regulations as final regulations, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and§ 103.11(b) of the Customs Regulations (19 CFR 103.11(b), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, 1099 14th Street, NW—Suite 4000, Washington, DC.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Pursuant to 5 U.S.C. 553(a)(2) and (b)(B), public notice is inapplicable to these interim regulations because they concern matters relating to agency management and personnel. Further, inasmuch as these amendments merely advise the public of Customs new field and Headquarters organization which will be in effect October 1, 1995 (the beginning of the fiscal year), good cause exists for dispensing with notice and public procedure thereon as unnecessary. For the same reasons, it is determined that good cause exists under the provisions of 5 U.S.C. 553(d)(2) and (3) for dispensing with the requirement for a delayed

effective date. Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply. This amendment does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Attorney, Office of Regulations and Rulings, Regulations Branch. However, personnel from other offices participated in its development.

AMENDMENTS TO THE REGULATIONS

For the reasons given above and under the authority of 19 U.S.C. 66 and 1624, those parts of chapter 1 of the Customs Regulations (19 CFR chapter 1) listed below are amended as set forth below:

In the list below, for each section indicated in the left column, remove the words indicated in the middle column from wherever they appear in the section, and add, in their place, the words indicated in the right column; where a dot leader is present across the right column, there are no replacement words:

Section	Remove	Add
4.1(b)	within a Customs district	at a Customs port
4.1(b), (c)(1), (d), and (g)	district director	port director
4.1(c)(2)	district director of Customs	port director
4.2(a)	district director	port director
4.5(a)	district director	port director
4.6(a) and (b)	district	port
4.6(b)	defined in §§ 101.1(b) and	described in §
4.7(b) and (d)(2)	district director	port director
4.9(a)	district	port
4.9(b)	District Director of Customs	port director
4.9(b) and (c)	district director	port director
4.12(a)(1)–(5)(b)	district director	port director
4.13(c)	district director	port director
4.14(b)(1)	district director	port director
4.14(b)(2)(ii), (d)(1)(v), and (d)(2)(iii)	Carrier Rulings	Entry and Carrier Rulings
4.14(b)(2)(ii)(A), (d)(1)(v), and (d)(2)(iii) and (iv)	regional commissioner	vessel repair liquidation unit
4.14(b)(2)(ii)(A)	Enforcement	Investigations
4.15(a) and (c)	district director	port director
4.16(a)	district director of Customs	port director
4.16(a) and (b)	district director	port director
4.20(c)table note 3	district director	port director
4.23	district director	port director
4.24(a)	several Regional Commissioners of Customs	Directors of the ports where the collections were made

Section	Remove	Add
4.24(b)	Regional Commissioner of Customs	appropriate port director
	Regional Commissioner	port director
	Regional Commissioner of Customs	Port Director
4.30(a), (f)–(i), (i)(3), and (k)–(m)	district director	port director
4.31(a)	district director at	director of
4.31	district director	port director
4.31(b)	in his district	at the port
4.32(b)	district director	port director
4.33(a)(1)	district director to the	director of that
4.33(a)(2), (c)(2) and (3), and (d)	district director	port director
4.33(c)(1)	district	
4.33(c)(3)	district director at	director of
4.34(a), (b), (d), and (g)	district director	port director
4.34(a) and (d)	district director at	director of
4.35	district director	port director
4.36(d)	district director	port director
4.37(a), (c), (d), and (f)	district director	port director
4.38	district director	port director
4.39(e)	district directors	port directors
4.41(b)	district	
4.41(c)	in the district	at the port
	district director at	director of
4.41(d)	district director	port director
4.60(d)	district director	port director
4.61(b) introductory text	district director	port director
4.65a	district director of Customs	port director
4.66(a) introductory text	district director	port director
4.66a	district director	port director
4.66b	district director	port director
4.66c	district director	port director
4.68(a)	district director	port director
4.72	district director	port director
4.73	district director	port director
4.73(d)	in his district	at his port
4.74	district director	port director
4.75(a) and (c)	district director	port director
4.75(b)	district director at	director of
4.80(b)	district director	port director
4.80a(d)	Carrier Rulings	Entry and Carrier Rulings
4.80b(b)	Carrier Rulings	Entry and Carrier Rulings
4.81(d) and (e)	district director	port director
4.81(d)	district director at	director of
4.82(b) and (d)	district director	port director

Section	Remove	Add
4.85(a), (b), and (e)	district director at	director of
4.85(a)–(d)	district director	port director
4.87(b), (c), and (d)	district director	port director
4.87(g)	district director at	director of
4.88(a)	district director at	director of
4.88(b)	district director	port director
4.89(b) and (d)	district director	port director
4.91	district director	port director
4.91(a) and (b)	district director at	director of
4.93(c)	district director at	director of
4.94(c)	district director of Customs	port director
	district director	port director
4.94(d) form	District Directors	Port Directors
	Customs district	Customs port
	(Name of district or districts)	(Name of port or ports)
	(District Director of Customs)	(Port Director of Customs)
4.96(f) and (h)	district director	port director
4.97(c) and (d)	district director at	director of
4.98(a)(1) schedule	district to district	port to port
	from another district	from another port
4.98(d)	Customs district, but not for a permit to proceed to a port in the same district	Customs port
	from one district	from one port
	to another such district	to another port
4.98(e)	Customs district, but not arriving from a port in the same district	Customs port
	in one district	at one port
	another such district	another port
4.99(c)	district director	port director
4.100(a)	district director of the district in which are located	directors of
4.100(c)	district director	port director
4.100(e)	district director in	port director at
7.8(b)(1)	district director at	director of
7.8(b)(1) and (2)	district director	port director
10.1(b) and (d)	district director	port director
10.3(a) introductory text	district director of Customs	port director
10.3(c)(3)	district director	port director
10.5(d) and (g)	district director at	director of
10.5(e), (g), and (h)	district director	port director
10.6	district director at	director of
	district director's	port director's
10.7(c)	district director at	director of
10.7(d)	district director	port director
10.8(b), (c), and (d)	district director	port director

Section	Remove	Add
10.8a(c)	district director	port director
10.9(b), (c) and (d)	district director	port director
10.21	district director	port director
10.24(b)–(e)	district director	port director
10.31(a)(3)(ii) and (f)	district director	port director
10.31(b)	district director of Customs	port director
10.36(a)	district director	port director
10.37	district director at	director of
	Commercial Rulings	Tariff Classification Appeals
	district directors	port directors
10.38(a)	district director of Customs	port director
10.38(g)	district director at	director of
10.39(a), (b), and (d)(1) first sentence and (2)	district director	port director
10.39(d)(1) second sentence, (e) introductory text, (e)(1)–(3), and (f)	district director	Fines, Penalties, and Forfeiture Officer
10.39(h)	district director's	port director's
	regional commissioner of Customs	designated Headquarters official
10.40(b)	district director	port director
10.41a(a)(2) and (e)	district director	port director
10.41a(e)	district director at	director of
10.41b(h)	district director	port director
10.43(a)	district director	port director
10.48(c) and (d)	district director	port director
10.49(b)	district director	port director
10.49(d)	district director at	director of
10.52	district director	port director
10.53(e)(5)	district director of Customs	port director
10.53(g)	district director	port director
10.56(e)	district director	port director
10.59(a)(3) and (e)	district director	port director
10.59(e)	district director for	director of
10.60(f) and (h)	district director	port director
10.61	district director	port director
10.62(c)(1) and (e)	district director of Customs	port director
10.62(f)	regional commissioner of Customs	port director
10.62a(b)	district director	port director
10.64(a) introductory text, and (b)	district director	port director
10.64(a) introductory text	district director at	director of
10.65(c)(2)	district director of Customs	port director
10.66(a)(3)	district director at	director of
10.66(b) and (c)(1)	district director	port director
10.67(a)(3) form	District No. ___,	
	District Director's Office	Port Director's Office

Section	Remove	Add
10.67(b) and (c)	district director	port director
10.68(a)	district director	port director
	district directors	port directors
10.70(a)	district director	port director
10.71(c)	district director	port director
10.71(e)	district director of Customs	port director
10.75	district director	port director
10.81(a)	in any district	at any port
	district director for the district	director of the port
10.81(b)	in another district	at another port
	a port in the district in	the other port at
	at which port	where
10.83(a)	district director	port director
10.84(d)	district director of Customs	port director
10.84(e)	district director of Customs of the district	director of the port
10.101(c) and (d)	district director	port director
10.102(a)	district director	port director
10.102(d)	regional commissioner of Customs	port director
10.104	district director	port director
10.107(b) and (c)	district director	port director
10.108	district director	port director
10.121(b)	district director of Customs	port director
	district director of Customs at	director of
10.134	district director	port director
10.151	district director	port director
10.152	district director	port director
10.172	the appropriate district director	port director
10.173	district director	port director
10.174	district director	port director
10.175(d)(2)	district director	port director
10.177(b)	appropriate district director	port director
10.179(b)(1)	district director at	director of
10.183(c)(1) and (2), (d)(2) text and form, and (e)	district director	port director
10.183(c)(2)	district director at each district	director of each port
10.183(c)(2) and (d)(2)	district director in the district	director of the port
10.183(d)(2) form	in the district	at the port
	District Director	Port Director
10.192	appropriate district director	port director
10.193(c)(2)	district director	port director
10.194	district director	port director
10.196(b)	appropriate district director	port director

Section	Remove	Add
10.198(a)(1)(i) and (ii), (b), and (c)	district director	port director
10.307(c), (e) introductory text, and (e)(2)	district director	port director
10.309	district director	port director
11.1(a)	district director	port director
11.1(c)	the Customs inspector with a rubber stamp bearing the legend "U.S. Customs — American Goods Returned ——, Inspector." The inspector's initials shall appear in the space provided therefor.	Customs
11.2(a)	district director of Customs	port director
11.6	district director	port director
11.12(b)–(f)	district director	port director
11.12a(b)–(f)	district director	port director
11.12b(b)–(f)	district director	port director
11.13(c)	district director	port director
12.8(b)	district director	port director
12.9	district director	port director
12.11(a)	district director at	director of
12.11(b)	district director	port director
12.12	district director	port director
12.14(a)	District directors	Port directors
12.14	district director	port director
12.16(b)	district directors	port directors
12.16(c)	district director	port director
12.17	district director	port director
12.19	district director	port director
12.20	district director	port director
12.22	district director	port director
12.23(a)	District directors	Port directors
12.23(b)–(d)	district director	port director
12.24(c)	district director	port director
12.26 (e), (f), (h), and (l)	district director	port director
12.28	district director of Customs	port director
12.29(d)	district director	port director
12.33(d)	district director	port director
12.37(a)	district director	port director
12.39(b)(3)	District directors	Port directors
12.39(b)(3) and (d)(2)	district director	port director
12.42(a), (b), and (c)	district director	port director
12.42(e)	district directors	port directors
12.43(c)	collector of customs	port director
12.44	district director	port director
12.45	district director	port director
12.48(d)	district director	port director
12.61(b)	district director	port director

Section	Remove	Add
12.73(c)(2), (j), and (k)	district director	port director
12.73(j)	district director of Customs	port director
	district director for	director of
112.80(b)(1), (b)(1)(iii), (d)–(f), and (h)	district director	port director
12.85(c)(1), (c)(6), (d)(7), (e)(1) and (2), and (f)	district director	port director
12.85(e)(2)	district director for	director of
12.91(c)	district director of Customs	port director
12.91(d) and (f)	district director	port director
12.91(d)	district director for	director of
12.99(c)(2)	an inspector or other	a
12.103	district director of Customs	port director
12.104c(a)–(c)	district director	port director
12.104d	district director	port director
12.104e(a) introductory text	district director	port director
12.107	district director of Customs	port director
12.108	district director	port director
12.109(a)	district director	port director
12.113(a)	district director of Customs at	director of
12.113	district director	port director
12.113(b)	district director at	director of
12.114	district director of Customs	port director
	district director	port director
12.115	district director of Customs	port director
	district director	port director
12.116	district director of Customs	port director
	district director	port director
12.117(a)	district director of Customs	port director
12.117(b)	district director	port director
12.121(a) introductory text	district director at	director of
12.122(a) introductory text, and (b) introductory text	district director at	director of
12.122(b)(1) and (2), (c), and (d)	district director	port director
12.123(a), (b), (c) introductory text, and (c)(2)	district director	port director
12.124(b) introductory text	district director	port director
12.125 introductory text	district director	port director
12.126	district director	port director
12.130(g) and (h)	district director	port director
12.131	District directors	Port directors
12.132(a)(3)	district director	port director
18.1(b)	appropriate area director	port director
18.2(b)	district director of Customs	port director
18.2(d)	district director	port director
18.3(a)	district director of Customs	port director

Section	Remove	Add
18.3(b)	district director	port director
	district director at	director of
18.4(a)(2)	district director of Customs	port director
18.4(a)(2) and (f)	district director	port director
18.4a(c)	district director of Customs	port director
18.4a(d)	district director at	director of
18.5(b)	district director of Customs at	director of
18.5(c), (d), and (f)	district director at	director of
18.6(b)	district director	port director
18.7(a) and (b)	district director	port director
18.7(c)	district directors	port directors
18.8(d)	district director	Fines, Penalties, and Forfeiture Officer
18.8(e)(2) first sentence and (e)(3)	district director	port director
18.8(e)(2) last sentence	district director	Fines, Penalties, and Forfeiture Officer
18.10(b)	district director	port director
18.10a	district director	port director
18.11(b)	district director of Customs	port director
18.11(c)	district director of customs for	director of
18.11(c), (e), and (h)	district director	port director
18.12(d)	district director of customs	port director
18.12(e)	district director at	director of
	district director	port director
18.13(a) form	DISTRICT DIRECTOR OF CUSTOMS	PORT DIRECTOR
	district director at	director of the port of
18.13(b)	district director at	director of
18.20(a)	district director of Customs	port director
18.20(a) and (b)	district director	port director
18.21(c)	district director	port director
18.22(b)	district director	port director
18.23(a)	district director at	director of
18.24(a)	district director of Customs	port director
	district director	port director
18.25(a) and (e)	district director	port director
18.26(a)	district director of Customs at	director of
18.26(d)	district director	port director
18.27	district director	port director
18.42	district director of Customs	port director
	district director	port director
18.43(b) and (c)	district director	port director
18.45	district director of Customs at	director of
19.1(a)(1) and (4)	district director	port director

Section	Remove	Add
19.2(a) and (e)–(g)	district director	port director
19.3(a)	within the same district	at a port
	district director of the district	director of the port
19.3(b)–(f)	district director	port director
19.3(f) and (g)	Regional Commissioner	Assistant Commissioner, Office of Field Operations or designee
19.4	district director	port director
19.6(a), (b)(1), (d)(1)(iv), (d)(2), and (e)	district director	port director
19.7(b)	district director	port director
19.8	district director	port director
19.9(a) and (c)	district director	port director
19.10	district director	port director
19.11(c), (d), (f), and (h)	district director	port director
19.12(a)(3), (6), and (8), (b)(6)	district director	port director
19.12(a)(3)	of the district	of the port
19.12(a)(5)	Regional Director	Field Director
19.13(a) and (d)	district director	port director
19.13(b)	district director for	director of
19.14(c) and (e)	district director	port director
19.14(c) form	District Director	Port Director
19.15(f) legend	district director at	director of
19.15(j)	district director	port director
19.17(a)	district director of the district in	director of the port nearest
19.17(c), (e), and (g)	district director	port director
19.17(g)	Regional Director	Field Director
	in whose district	at whose port
19.19(a)	district director of Customs for the district in	director of the port nearest
	district director of Customs	port director
19.19(b)	Regional Director	Field Director
	for the district in	of the port nearest
19.23	district director at	director of
	district director for each district	director of each other port
	in a given district	nearest a given port
19.32(b)	district director	port director
19.34	District directors	Port directors
	for the district concerned	
19.35(d)	district director's	port director's
19.35(f) and (g)	district director	port director
19.36(a)–(d) and (g)	district director	port director
19.37(a), (b), and (d)	district director	port director
19.39(a)(2), (b)(2), (c)(2) and (5), (d), and (e)	district director	port director
19.40(a)	district director	port director

Section	Remove	Add
19.40(b)	within the same district	at a port
	district director of the district	director of the port
19.43	district director	port director
19.45	district director	port director
19.46	district director	port director
19.47	district director	port director
19.48(a) introductory text, (b), and (c)	district director	port director
24.1(a)(3)(i) and (ii)	district director	port director
24.2	District directors in charge of ports of entry	Port directors
	district director	port director
24.3a(c)	Customs National Finance Center	Customs Accounting Services
24.4(a)	district director of each district in	director of each port at
24.4(a)–(d)(1) and (h)(3)(i)	district director	port director
24.4(b)	in a Customs district	to a Customs port
	district director of such district	port director
	in such district	
24.4(c)(1)	in that district	at that port
	in the district and	at
	or ports for which filed	
24.4(c)(2) declaration	district director in any other district	any port director
	district director of all other districts	director of any other port
24.4(h)(2)	Customs districts	Customs ports
24.4(h)(2) and (3) introductory text	any district	any port
24.5(f)	National Finance Center — Revenue Branch	Accounting Services – Accounts Receivable
24.11(b)	district director	port director
24.12(c)	district director	port director
24.13(c)	district director	port director
	district directors	port directors
24.13(d)	district director for the Customs district	director of the port
24.13(f) heading	District director	Port director
24.13(f)	district director	port director
	district directors	port directors
24.13a(g)	Director, Office of Cargo Enforcement and Facilitation	Assistant Commissioner, Field Operations
	1301 Constitution Avenue, NW.,	
24.14(c)	district director's	port director's
24.16(a) and (c)(1)	district director	port director

Section	Remove	Add
24.16(c)(1) and (2)	district director of Customs	port director
24.17(a) introductory text	district directors	port directors
24.17(d)(4)	district director	port director
	Regional Commissioner who	Accounting Services – Accounts Receivable, which
24.22(b)(3), (c)(3), and (e)(2)	district or	
24.22(b)(3)	National Finance Center	Accounting Services
24.22(d)(3)	National Finance Center, Revenue Branch	Accounting Services—Accounts Receivable
24.22(i)(2)	National Finance Center, Attn: Revenue Branch	Accounting Services—Accounts Receivable
24.23(a)(1) and (3)	district director	port director
24.24(b)(1) table note	Users Fee Task Force, U.S. Customs Service, Room 4112, 1301 Constitution Ave. NW.	Office of Finance, U.S. Customs Service, Headquarters
	; tel. 202–566–8648	
24.24(c)(8)(i)	U.S. Customs Service, Office of Inspection and Control, 1301 Constitution Avenue, NW.	Office of Finance, U.S. Customs Service, Headquarters
24.24(g)	National Finance Center, Attn: Billings and Collections	Accounting Services—Accounts Receivable
	, National Finance Center,	of Accounting Services
24.36(c), (d) introductory text, and (e)(1)	district director	port director
24.36(d) introductory text	district directors	port directors
24.36(d)(9)	district directors'	port directors'
24.36(e)(2)	Customs district	port
24.70(c)	appropriate regional commissioner of Customs	port director
	regional commissioner	port director
	Director National Finance Center	Accounting Services Division, Accounts Receivable Group, Indianapolis, Indiana
24.72	district director	port director
54.5(b)	district director	port director
54.6(c) introductory text	district director at	director of
54.6(c)(4)	district director	port director
101.0	regions, districts, and ports of entry	ports of entry, service ports
101.4(a) and (b) introductory text	district director for the district	director of the port
101.4(b) introductory text and (d)	district director	port director
101.4(d)	any district	a port

Section	Remove	Add
101.5 table	Regional Commissioner	Port Director
101.6(c)	appropriate district director shall, with the approval of the regional commissioner of Customs,	port director shall
103.0	either the Chief, Regulations and Disclosure Law Branch, United States Customs Service, Washington, DC 20229, the Public Information Office at Headquarters, the appropriate regional commissioner of Customs	a disclosure law officer, the director of a service port
	in the appropriate Customs regional office	at the appropriate service port
103.5(b)(1)	Regulations and Disclosure Law Branch	Disclosure Law Officer
103.5(d)(1)	Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW.	Disclosure Law Officer, U.S. Customs Service, Headquarters
103.5(b)(2)	Director, Office of Regulations and Rulings	FOIA Appeals Officer
103.5(d)(2) heading	Regional offices	Service ports
103.5(d)(2)	regional commissioner of Customs of the region in	director of the service port at
	The addresses of the regional commissioners are listed in § 103.1.	
103.6(a)(1) heading	Regional offices	Service ports
103.6(a)(1)	regional commissioner of Customs	director of a service port
103.6(a)(2)	or Comptroller, as appropriate,	
103.7(a), (b)(6), and (c)	Director, Office of Regulations and Rulings	FOIA Appeals Officer at Headquarters
103.7(c)	Director	FOIA Appeals Officer
103.8(a) introductory text	Director, Office of Regulations and Rulings	FOIA Appeals Officer
103.8(a)(3)	Public Affairs Office	Office of Congressional & Public Affairs
103.10(d)(3)	Director, Office of Regulations and Rulings	FOIA Appeals Officer
	Director	FOIA Appeals Officer
103.14(d)(1)(iii) and (2)(iii)	Regulations and Disclosure Law Branch	Disclosure Law Officer
103.14(e)(2)	National Finance Center, Revenue Branch	Accounting Services – Accounts Receivable
103.16	district directors of Customs	port directors
	district director of Customs	port director
111.3(b)(1) and (2)	district director	port director

Section	Remove	Add
111.11(b)(2)	in the customs district	at the customs port
111.11(c)(3)	in the customs district in which	at the customs port where
111.12(a)	district director of the district in which	director of the port where
	within the district	at a port
	district director's	port director's
111.12	district director	port director
111.15	district director	port director
	in his district	at his port
111.16(a)	district in	port at
111.19(b) heading	districts	ports
111.19(b)	in an additional Customs district	at additional customs ports
	Customs district to the district director of that district	port to the director of that port
	all districts	all ports
	in an additional district	at additional customs ports
	district director	director of that port
111.19(d)	within the district for which	at the port where
	district director	port director
	district director of	port director in
	Office of Trade Operations	Trade Compliance Division
	, through the appropriate regional commissioner	
111.22(b) introductory text, (b)(2), and (c)	district director	port director
111.22(e)	regional commissioner for the region	director of the port
111.23(a)(1)	within the Customs district to which they relate	at the port
111.23(b) and (b)(1)	district director for the district in	director of the port at
111.23(b)(5)	Regional Director,	Field Director,
111.23(d)	district director in	port director at
111.23(e)(2)	regional commissioner responsible for the region in which the centralized records are to be maintained	Office of Field Operations, Headquarters
111.23(f)	regional commissioner for the region in which a broker has given notification pursuant to paragraph (e) of this section,	Office of Field Operations, Headquarters,
111.24	Regional Director	Field Director
111.27	Regional Director	Field Director
	district director	port director
111.28(b)(1)–(3) and (c)	district director	port director

Section	Remove	Add
111.28(b)(1)	in that district	at that port
111.30(a)	district director for the district in which	director of the port where
111.30(b)	each district director of the districts in which	each port director where
111.30(d)	Office of Trade Operations	Trade Compliance Division
111.54	district director	port director
	the assistant district director	another Customs officer
	an assistant district director as appropriate officer of the Customs, the Commissioner	a Customs officer, Headquarters
	one of the assistant district directors	a Customs officer
111.55	director of the appropriate district	director of the port
111.56	district director	port director
111.57	district director	port director
111.59(a) and (b) introductory text	district director	port director
111.60	district director	port director
111.61	district director	port director
111.62(e)	district director	port director
111.63 (a) introductory text, (a)(3), (a)(4), (b) introductory text, (b)(3), and (b)(4)	district director	port director
111.64(a)	district director	port director
111.67(d)	district director	port director
111.72	district director	port director
111.78	the regional Commissioner or the district director, with the approval of the regional Commissioner	Headquarters or the port director, with the approval of Headquarters
111.91	appropriate Customs officer	Customs Service
111.92	appropriate Customs officer	Customs Service
	district director	port director
111.94 heading and text	appropriate Customs officer	Customs Service
	apropriate Customs officers	Customs Service
111.95	district director	Fines, Penalties, and Forfeiture Officer
	appropriate Customs officer	Customs Service
111.96(a) and (c)	district director	port director
111.96(c)	in each district	at each port
112.11(a)	district director	port director
112.12(a), (b) introductory text, and (b)(4)(ii)	district director	port director
112.12(b)(3)	district director in the Customs district	director of the port
	Customs districts	Customs ports

Section	Remove	Add
112.12(b)(3)	district director for one of the districts	director of one of the ports
	district director for each additional district	director of each additional port
112.13 introductory text	district director	port director
112.14	district director of the district	director of the port
	district director	port director
112.21	district director	port director
112.22(a)	district director for the district in which	director of the port where
112.22(a)(1), (a)(3), (b)(1), (b)(2), and (c)	district director	port director
112.23	district director	port director
	Customs special agent in charge for the district in which	appropriate special agent in charge where
112.24 introductory text	district director	port director
112.27(c)	district director	port director
112.29	district director	port director
112.30(a) introductory text, (a)(7), (a)(8), (a)(10), (b), (c), (d)(2), and (e)	district director	port director
112.41	district director	port director
112.42	district director	port director
112.44	district director	port director
112.45 introductory text	district director	port director
112.46	district director	port director
112.48(a) introductory text, (b), (c), (d)(2), and (e)	district director	port director
112.49	district director	port director
113.1	district director	port director
113.11	in a single Customs district	at one Customs port
	district director of the district in which	director of that port where
	one district	one port,
	district director	port director
	regional commissioner	drawback office
113.12 (a), (b) introductory text, and (b)(2)	district director	port director
113.13(b) and (d)	district director or regional commissioner	port director or drawback office
113.13(c)	district directors and regional commissioners	port directors and drawback offices
	district or region	port or drawback office
	district or regional commissioner	port director or drawback office
113.14	district director	port director
	Commercial Rulings	Tariff Classification Appeals

Section	Remove	Add
113.15	district director	port director
	district office	port
	Commercial Rulings	Tariff Classification Appeals
	regional office of the approving regional commissioner	appropriate drawback office
113.23(d)	district director	port director
113.24(a) introductory text	district director	port director
113.24(b)	with the district director in whose district	at the port where
113.26(e)	district office	port
113.27(a)	district director or regional commissioner	port director or drawback office
	in whose district or region	where
	district or regional office	port or drawback office
113.27(b)	district director in whose district the bond was approved or regional commissioner	director of the port where the bond was approved or appropriate drawback office
	district director, or regional commissioner	port director, or drawback office
113.32(a)(1)	district director, or regional commissioner	port director or drawback office
113.33(c)	district director or regional commissioner	port director or drawback office
113.33(d)	district director	port director
113.35(a), (c)(2), (d), and (e)	district director	port director
113.35(b)(4)	Customs district in which	port where
113.35(c)(1)(ii)	Customs district	port
113.37(a)	district directors	port directors
113.37(f) form	District Director (Regional Commissioner)	Port Director (Drawback Office)
113.37(g)(1)(iii)	District(s) in which	Port(s) where
113.37(g)(4)	district	port
113.37(g)(5)	district(s)	port(s)
113.38(c)(1) heading and text	district director	port director
113.38(c)(1) and **new** (4)	Commercial Rulings	Tariff Classification Appeals
113.38(c)**new**(2)	district directors and regional commissioners	port directors
113.38(c)**new**(6)	, (2), and (3)	and (2)
113.39 introductory text, (a), and (a)(5)	district director or regional commissioner	port director
113.39(a) introductory text	Commercial Rulings	Tariff Classification Appeals
113.40(a)	district director	port director
113.40(b) and (c)	district director or regional commissioner	port director or other appropriate Customs officer
113.43(a) and (b)	district director	port director

Section	Remove	Add
113.53(b) heading and text ...	district director	port director
113.55(a)(1), (c)(2) heading and text, (c)(3), and (d)	district director	port director
113.62(a)(3)	district director	port director
114.25	district director of Customs at	director of
	district director	port director
114.26(a)	district director of customs ..	port director
114.26(b)	district director	port director
114.34(a) and (b)	district director	port director
118.1	district director	port director
118.2	district director	port director
	district	port
118.4(f), (g), and (k)	district director	port director
118.5	district director	port director
118.11(b) and (h)	district director	port director
118.12	district director	port director
118.13	district director	port director
118.21(a) introductory text, and (b) introductory text	district director	port director
118.22	district director	port director
118.23	Regional Commissioner having jurisdiction over the district director who signed the notice	Assistant Commissioner, Office of Field Operations
	district director	port director
	Regional Commissioner	Assistant Commissioner, Office of Field Operations
122.1(c)(2)	district director	port director
122.3	district director at	director of
	district directors	port directors
122.5(b)	District directors	Port directors
122.11(a)	in any particular district or area	in any port
	, rather than a general area or district	.....
122.12(d)	Customs district	Customs port
122.14(a)(1)	regional commissioner, or his representative, of the region in which	director of the port, or his representative, where
122.14(a)(2)	district director at	director of
122.14(a)(3)	regional commissioner	port director
122.14(a)(3)(ii) and (e)	district director	port director
122.14(e)	appropriate regional commissioner	Assistant Commissioner, Office of Field Operations, Headquarters
122.25(a), (b), and (d)(4)(iv) ..	district director	port director
122.31(b)	district director for the district in which	port director for the airport where

Section	Remove	Add
122.31(c)	district director at or nearest	port director at
122.31(f)	district director	port director
122.35(b)(1)	Customs officer	Customs Service
	nearest port entry	nearest port of entry
122.37(c)	district director	port director
122.38(d)	district director for the district in which	port director for the airport where
122.38(e) and (f)	district director	port director
122.49(a)(1), (b)(1), (d) heading and text, and (e)(1)	district director	port director
122.54(f) and (g)	district director at	director of
122.54(g)	district director	port director
122.63(b)	, unless some other place is designated by the district director at that port	
122.64	district director at the Customs	director of the
	, unless some other place is designated by the district director	
122.65	district director	port director
122.71(a)(1)	district director nearest the departure place	director of the port of departure
122.73(a)(2)	the district director	Customs
122.73(b)(2)	the district director or	Customs at
122.74(a)(1)	district director in the port of departure	Customs at the departure airport
122.74(b)(2)	district director	port director
122.76(a)(1)	district director at	port director of
122.76(a)(2)	district director	port director
122.77(a)	district director	port director
122.77(b)	at the port by the district director at	by the director of
122.79(b)	district director	appropriate port director
122.82	district director at	director of
122.92(a)(3) and (a)(3)(v) *Item 8*	district director	port director
122.92(a)(3)(v) *Item 1* and *Item 3*	district/	
122.93(a) heading and text	district director	port director
122.102(a)	district director	port director
122.114(d)	district director at	director of
122.118(a)	district director	port director
122.119(a)	district	
122.119(d)(1) introductory text, (d)(1)(ii), and (d)(2)	district director at	director of
122.120(b)(1) and (k)	district director at	director of
122.132(b)(2) and (c)	district director	port director
122.134(a) and (c)	district director	port director

Section	Remove	Add
122.135(b), (c), and (e)	district director	port director
122.143(b)	district director	port director
122.144(b)	district director	port director
122.153	Regional Commissioner of Customs, Miami, Florida	Assistant Commissioner, Office of Field Operations, Customs Headquarters
122.162(a)(2) and (a)(4)	district director	port director
122.163(c) introductory text, and (c)(2)	district director	port director
122.165(b)	Carrier Rulings	Entry and Carrier Rulings
122.173(a) and (b)	Inspection and Control	Field Operations
122.175	district director	port director
122.176(a) and (b)	Inspection and Control	Field Operations
122.181	district director of Customs	port director
122.182(b)–(g)	district director	port director
122.183	district director	port director
122.183(d)	district director's	port director's
122.184	district director	port director
122.185	district director	port director
122.186	district director	port director
122.187(a) introductory text, (a)(4), (b)–(d), and (f)	district director	port director
122.188(a), (b), and (d)	district director	port director
123.1(a)(1)–(3)	appropriate district director	Commissioner of Customs, or his designee
123.1(b)	district director of the district in which the station is located	Commissioner of Customs, or his designee
123.1(d)	appropriate district director	port director
	district director	port director
	in the Customs district	in the Customs port
123.4(b)	district director	port director
123.8(a), (b)(1) and (2)	district director of Customs	port director
123.8(b)(2)	district director	port director
123.9(b)(1) and (2), and (d)(1)(iv) and (v)	district director	port director
123.14(b)	district director	port director
123.24(c)	district director of Customs	port director
123.25(a)	district director	port director
123.34 certification	district director of Customs	port director
123.72	District directors	Port directors
125.11(b)	district director	port director
125.11(c)	from the appropriation "Salaries and Expenses; Bureau of Customs."	by Customs.
125.12	district director	port director
125.13	district director	port director

Section	Remove	Add
125.14	district director	port director
125.23	district director	port director
125.33(c)	district director	port director
125.35	district director	port director
125.36	district director	port director
125.42	district director	Fines, Penalties, and Forfeiture Officer
127.1 introductory text, and (c)–(e)	district director	port director
127.12(b)(1)	district director	port director
127.13(a)	district director	port director
127.21	district director	port director
127.25	district director	port director
127.27	district director	port director
127.28(c), (d), (g), and (h)	district director	port director
127.29	district director	port director
127.35	district director	port director
127.36(a) and (c)	district director	port director
128.1(d) and (e)	district director	port director
128.11(a), (b)(7)(iv), and (c)	district director	port director
128.12(a) and (c)	district director	port director
128.12(c)	district director's	port director's
128.23(b)(3)	district director	port director
128.24(c)	district director of Customs	port director
132.11a(c)	district director	port director
132.12(a)	district director	port director
132.13(a)(1)	district director	port director
132.14(a)(4)(i), (a)(4)(i)(D), (a)(4)(ii), and (a)(4)(ii)(C)	district director	port director
132.23(a)	district director at	director of
132.23(a), (b), and (d)	district director	port director
132.25	district director	port director
133.23(b)(2) and (c)(2)	district director	port director
133.24	district director	port director
133.42(c)	district director	port director
133.43(a), (b) introductory text, (b)(2), (c) introductory text, (c)(1), (c)(1)(i), (c)(1)(ii), and (c)(2)	district director	port director
133.44	district director	port director
133.46	district director at	director of
133.47	district director	Fines, Penalties, and Forfeiture Officer
134.3(b) introductory text, and (b)(2)	district director	port director
134.25(a) and (c)	district director	port director
134.26(a) and (c)	district director	port director
134.34(a) introductory text, and (b)	district director	port director

Section	Remove	Add
134.51	district director	port director
134.51(a)	district director's	port director's
134.52(a)	District directors	Port directors
134.52(b)–(e)	district director	port director
134.53(a)(2)	district director	port director
134.54(a)	district director	port director
134.54(b) and (c)	district director	Fines, Penalties, and Forfeiture Officer
141.5	district director	port director
141.11(a)(2)	District directors	Customs officers
141.11(a)(5)	within the district	at the port
141.13	district director	port director
141.15(a)	district director	port director
141.16	district director	port director
141.20(a)(1) and (2)	district director	port director
141.35	district director	port director
141.38	district director	port director
141.44 heading	Customs districts	Customs ports
141.44	in all Customs districts	at all Customs ports
	of each district in which	of each port where
	district director	port director
	to each district in which	to each port where
	his district	his port
	districts to the appropriate districts	ports as appropriate
141.46	district director	port director
141.52 introductory text, and (i)	district director	port director
141.54(a)	district director	port director
141.54(c) certification	district director of Customs	port director
141.55	district directors	port directors
141.56	District directors	Port directors
141.61(e)(2), (e)(2)(ii), and (e)(4)	district director	port director
141.62(a)	district director in the district	director of the port
141.63(a) introductory text, and (b)	district director	port director
141.63(c)	district director at	director of
141.69(b) and (c)	district director	port director
141.83(c)(2)	district director	port director
141.84(c)	district director	port director
141.85 form	District Director of Customs	Port Director
141.86(a)(11)	district director	port director
141.88	district director	port director
141.90(a) heading and text	district director	port director
141.91(a) and (d)	district director	port director
141.92(a) introductory text, and (b)(4)	district director	port director

Section	Remove	Add
141.103	district director	port director
141.105	district director	port director
141.105 form	District Director of Customs	Port Director
141.112(b)–(d), (g), and (h)	district director	port director
141.113(a)–(d), (f), and (h)	district director	port director
142.2(a)	district director	port director
142.3(c)	district director	port director
142.3a(c) and (d)	district director	port director
142.4(c)(1) and (2)	district director	port director
142.6(a)(4)	district director	port director
142.7	district director	port director
142.11(b)	district director	port director
142.13(a) heading and introductory text	district director	port director
142.14(a)	regional commissioner of Customs for the region	port director
	in that region	at that port
	in any Customs region	
142.14(b) heading	region	port
142.14(c)	in each Customs region	at each Customs port
142.15	district director	port director
142.17(a) introductory text	district director	port director
142.17a(a) introductory text	district director	port director
142.18(a) introductory text	district director	port director
142.19(b)(2)	district director	port director
142.21(a), (e)(1) and (2), and (f)(1) introductory text	district director	port director
142.21(f)(1)(ii)	The district	The port
142.24(a)	district director	port director
142.25(a) heading and introductory text	district director	port director
142.26(a)	regional commissioner of Customs for the region	director of the port
	in that region	
	in all Customs regions	at all Customs ports
142.26(b) heading	region	port
142.26(c)	in all Customs regions	at all Customs ports
142.27	district director	port director
142.28(a) introductory text	district director	port director
142.42 introductory text	District Director	port director
142.42(a)	District or port	Port
142.42(c)	districts	ports
142.43(a) heading	District	Port
142.43	District Director	port director
142.43(c)	in another district	at another port
	in his district	at his port
	Management	and Technology
142.44	District Director	port director
	in the district	at the port

Section	Remove	Add
142.45(a) and (c)	District Director	port director
142.48(c)	district/	
142.49	District Director	port director
142.49(b)	district or	
142.50	District Director	port director
142.51	district director	port director
142.52 heading	District–wide and multiple district	Port–wide and multiple port
142.52(a) heading	District–wide	Port–wide
142.52(a)	a District Director	the port director
	in the district	at the port
142.52(b) heading	Multiple district	Multiple port
142.52(b)	in one district	at one port
	in another district	at another port
	District Director of the other district	port director of the other port
	in all districts, a District Director	at all ports, a port director
	in a district	at his port
143.2 introductory text	district director	port director
	Management	and Technology
143.3(a) introductory text and (b)	Management	and Technology
143.3(b)	district director	port director
143.5	Office of Automated Commercial Systems	User Support Services Division
143.6	ACS	User Support Services Division
143.6(b)	Commercial Operations	Information and Technology
143.7(a)	Trade Operations	Trade Compliance
143.7(b)	ACS	User Support Services Division
143.7(c)	Commercial Operations	Information and Technology
143.8	Commercial Operations	Information and Technology
	Trade Operations	Trade Compliance
	ACS	User Support Services Division
143.11(a) introductory text, and (b)	district director	port director
143.22	district director	port director
143.23 introductory text	district director	port director
143.37(c) and (d)	Commercial Operations	Field Operations
144.11(b)	district director	port director
144.12	district director	port director
144.13	district director	port director
144.34(a)	district director	port director
144.36(c) and (h)	district director	port director

Section	Remove	Add
144.37(a), (d)–(f), and (h)(2)(ii) and (v)	district director	port director
144.37(b)(3)	district director at	director of
144.38(d)	district director	port director
144.41(b)	district director	port director
144.41(h)	district	
144.42(b)(3)	district director	port director
145.4(b)	district director	Fines, Penalties, and Forfeiture Officer
145.4(c)	district director at	director of
145.4(d)	district director at	Fines, Penalties, and Forfeiture Officer having jurisdiction over
145.12(a)(1) and (c)	district director	port director
145.14(b)	district director	port director
145.22(a)	since a copy of the entry will have to be obtained from the Regional Commissioner of Customs, New York, N.Y., before the entry can be amended	
145.22(b)	district director	port director
145.23	district director	port director
145.24	district director	port director
	the Regional Commissioner	Customs
145.25	district director	port director
145.31	district director	port director
145.32	district director	port director
145.35	district director	port director
145.36	district director	port director
145.41	district director	port director
145.42	district director	port director
145.54(c) introductory text, and (c)(3)	district director	port director
146.1(b)(2)	district director	port director
146.2 heading	District director	Port director
146.2	district director in whose district	port director where
146.3(b)	district director	port director
146.4(g)	district director	port director
146.4(h)	district boundaries	port limits
146.6(a)	district director of the district in which	port director geographically nearest to where
146.6(a), and (c) and (d) headings and text	district director	port director
146.6(e)	district director's	port director's
146.7	district director	port director
146.8	district director	port director
146.9	district director	port director

Section	Remove	Add
146.10	district director	port director
146.13	district director	port director
146.21(b)	district director	port director
146.22(b)	district director	port director
146.23(c)	district director	port director
146.25(a) and (c)	district director	port director
146.26	district director	port director
146.31(a)	District directors	Port directors
	district directors	port directors
146.32(a), (b)(5), (c) introductory text, (c)(3), and (d)(2)(i)	district director	port director
146.34(a) and (b)	district director	port director
146.35(b), (d), and (e)	district director	port director
146.36	district director	port director
146.37(b), (c)(1), and (d)	district director	port director
146.38	district director	port director
146.39(b), (c) introductory text, (d), and (e)	district director	port director
146.39(d)	district director's	port director's
146.40(a)(2), (5), and (7), and (c)(1), (2), (3)(i), and (4)	district director	port director
146.41(a), (c), and (d)	district director	port director
146.42(c)	district director	port director
146.44(c)(2)	district director	port director
146.51	district director	port director
146.52(a)–(d)(1) and (e)	district director	port director
146.53(a) introductory text, (a)(3), (b)–(d)	district director	port director
146.61	district director	port director
146.62(c)	district director	port director
146.63(c)(1)	district director	port director
146.64(c)	district director	port director
146.65(b)(3) and (c)	district director	port director
146.66(a)	district director	port director
146.67(d)	district director	port director
146.68	district director	port director
146.69(b) and (c)	district director	port director
146.70(b) and (c)	district director	port director
146.71	district director	port director
146.81(b)	district director	port director
146.82(a) introductory text, and (b)(1)	district director	port director
146.82(b)(2)	regional commissioner of the region in which the zone is located	Assistant Commissioner, Office of Field Operations, or designee,
146.82(b)(3) heading	regional commissioner	Assistant Commissioner

Section	Remove	Add
146.82(b)(3)	regional commissioner	Assistant Commissioner, Office of Field Operations, or designee,
146.83(a) heading and text	district director	port director
146.83(a)	Commercial Rulings	Tariff Classification Appeals
146.95(a)(3)(i)	district director	port director
147.1(d)	which is in the same Customs district as the fair	
147.3	district director	port director
147.13(b)	district director	port director
147.14(a)	district director	port director
147.32	district director	port director
147.33	district director	port director
147.41	district director	port director
148.6(b)	district director	port director
148.8(d)	district director at	director of
	district director	port director
148.25(b)	district director	port director
148.32(b)	district director	port director
148.37(a)	district director	port director
148.39(b)	district director	port director
148.46(b)	district director	port director
148.52(b) and (d)	district director	port director
148.54(c)	district director	port director
148.63(a) introductory text	district director	port director
148.66(b)(2) heading and text	district director	port director
148.77(a)	District directors	Port directors
148.77(c)(1) and (2)	district director	port director
148.84(a)(2)	district director	port director
148.90(a)	District directors	Port directors
148.90(b)	district directors	port directors
148.90(c), (d)(1)(ii), (d)(2)(i), and (d)(2)(iii)	district director	port director
148.105(a)	Commercial Operations	Field Operations
148.115(e)	district director	port director
151.1	district director	port director
151.2(a)(1)	District directors	Port directors
151.2(a)(2)	district director	port director
151.4(b) introductory text, and (c)(1) and (2)	district director	port director
151.6	district director	port director
151.7 introductory text, (a), (b), and (d)	district director	port director
151.7(a)	under control of a Customs officer	under the control of Customs
151.7(c)	a Customs officer	Customs
151.7(d)	in charge of a Customs officer	under the control of Customs

Section	Remove	Add
151.8(b) and (c)	district director	port director
151.9	district director	port director
	where a Customs officer is stationed	under the control of Customs
151.10	district director	port director
	a Customs officer	Customs
151.11	district director	port director
151.13(a) introductory text	that District Director	that the port director
	District Director	port director
151.13(a)(2), (b) introductory text, (b)(9) form, (d)–(f), (g)(2), (h), (j), (k), and (l)(2)	Office of laboratories and	Laboratory &
151.13(b)(9) form	district director	port director
151.15(a), (b) introductory text, and (d)	district director	port director
151.15(c)	District directors	Port directors
151.15(d)	district director's	port director's
151.26	district director	port director
151.28	district director	port director
151.42(a)(1)–(3) and (c)	district director	port director
151.42(a)(3)	Office of laboratories and	Laboratory &
151.44(a) and (c)	district director	port director
151.51(b)	district director	port director
151.52(c)	district director	port director
151.54 introductory text	district director	port director
151.55	district director	port director
151.65	district director	port director
	district director's	port director's
151.68(c)	district director	port director
151.69(b)	district director	port director
151.70	district director	port director
151.71(a)–(c)	district director	port director
151.71(c)	district director's	port director's
151.73(b) and (c)	district director	port director
151.73(b)	district director's	port director's
151.74 heading	district director's	port director's
151.74	district director	port director
151.75	district director	port director
151.76(a) and (b)	district director	port director
151.76(c)	district director's	port director's
151.84	district director	port director
151.85	district director	port director
	district director's	port director's
152.1(c)	district director	port director
152.2	district director	port director
152.13(a), (c)(1), (c)(3), and (d)	district director	port director
152.16(c)	district director	port director

Section	Remove	Add
152.26 introductory text, (b), and (e)	district director	port director
152.26(b) heading, and (d)	district director's	port director's
152.101(c) and (d)	district director	port director
152.103(a)(5)(iii), (d), (l) (1), (l)(2)(iii), and (m)	district director	port director
152.105(i)(2)	district director	port director
152.106(f)(2)	district director	port director
158.1(b) introductory text	district director	port director
158.3	district director	port director
158.5(a)	district director	port director
158.6	district director	port director
158.11(a), and (b)(1) and (3)	district director	port director
158.12(a)	district director	port director
158.13(a), and (b) heading and text	district director	port director
158.13(a)(1)	district director's	port director's
158.14	district director	port director
158.24	district director at	director of
158.25	district director	port director
158.27(b)	district director at	director of
158.28	district director	port director
158.29 heading and text	district director	port director
158.30 heading, and (a) text	district director's	port director's
158.30	district director	port director
158.42(b)	district director at	director of
158.42(c) and (d)	district director	port director
158.43(a), (c), and (e) heading and text	district director	port director
158.44(a)	Custom Service	Customs Service
158.44(c)	district director	port director
159.7(a) introductory text	in the district	at the port
159.7(b)	in the district in which	at the port where
159.7(c)	district director	director
159.12(a)(1) introductory text, (a)(1)(ii), (b)–(e)	district director	port director
159.22(d)(2)	district director	port director
159.36(b)–(d)	district director	port director
159.38	district director	port director
159.44	district director	port director
159.58 heading and text	district director	port director
161.3	district director	port director
161.16	district director	port director
162.1d(b)	district director (area director New York region)	port director
162.3(b)	district director	port director
162.21(b)	district director	port director
162.32(a) and (c)	district director	port director
162.42	district director	port director

Section	Remove	Add
162.44(a)	district director for the district in which	director of the port where
162.44(b) and (c)	district director	port director
162.45(a)(3) and (4) and (c)	district director	port director
162.45a	appropriate Regional Commissioner of Customs	port director
	Regional Commissioner	port director
162.46(c) and (d)	district director	port director
162.46(c)(2) heading	district	port
162.46(c)(2) introductory text	in such other Customs district	at such other Customs port
162.46(c)(2)(ii)	in another Customs district	at another Customs port
162.47(a), (d), and (e)	district director	port director
162.48(a)	district director	port director
162.49(a)	district director	port director
162.50(a)	district director	port director
162.52(b)(2) and (4)	district director	port director
162.64	district director in whose district	director of the port where
162.65(c), (d), (e) introductory text, and (e)(1)	district director	port director
162.71(e)(4)	district director	port director
162.72(a)	district director	port director
162.74(a), (b)(4), (c), (h), and (j)	district director	port director
162.74(c), (d)(3), (d)(4)(i), and (e)(1)	Enforcement	Investigations
162.75(a), (c), (d)(1), (d)(2), (d)(2)(i), and (d)(3)	district director	port director
162.76(a)	district director	port director
162.77(a)	district director	port director
162.78(a), (b), and (d)	district director	port director
162.79(a) and (b)(1)	district director	port director
162.79b	district director	port director
162.80(a)(1), (a)(2)(i), and (a)(2)(iii)	district director	port director
171.12(a)	district director for the district in which	Fines, Penalty, and Forfeiture Officer for the port where
171.12(e)	district director	Fines, Penalty, and Forfeiture Officer
171.15(a) introductory text, (a)(4), and (a)(7)	district director	Fines, Penalty, and Forfeiture Officer
171.21 heading and text	district director	Fines, Penalty, and Forfeiture Officer
171.22 heading and text	district director	Fines, Penalty, and Forfeiture Officer
171.31	district director	Fines, Penalty, and Forfeiture Officer

Section	Remove	Add
171.33(a) introductory text, (b)(1) heading and text, (b)(2), and (c)	district director	Fines, Penalty, and Forfeiture Officer
171.33(b)(1)	regional commissioner of the region in which the district lies	designated higher level official
171.52(d)	district director for the district in which	Fines, Penalty, and Forfeiture Officer for the port where
	district director having jurisdiction over	Fines, Penalty, and Forfeiture Officer for
Part 171 Appendix A: III, 9.	district director or area director	Fines, Penalty, and Forfeiture Officer
	Regional Counsel of Customs	Chief Counsel representative in the field
	Regional Counsel	Chief Counsel representative
	Miscellaneous	
Part 171 Appendix B: (C)(1)(a), (b), and (d), and (C)(2)(a) and (b)	district director	port director
Part 171 Appendix B: (C)(2)(b)	within that district	at the port
	districts	ports
Part 171 Appendix B: (D)(1), (5), and (6)	district director	Fines, Penalty, and Forfeiture Officer
Part 171 Appendix B: (D)(6)	regional counsel	Chief Counsel representative in the field
	district director's	Fines, Penalty, and Forfeiture Officer's
	Commercial Fraud and Negligence Penalties Branch at	Penalties Branch,
	Commercial Fraud and Negligence Penalties Branch, Headquarters, Customs Service	Penalties Branch, Customs Headquarters
Part 171 Appendix C: I.A., I.D. and Note to I.D.	district director	Fines, Penalty, and Forfeiture Officer
Part 171 Appendix C: I.D. Note and I.G.	Regulatory Procedures and Penalties	International Trade Compliance
Part 171 Appendix C: I.G.	District Director	Fines, Penalty, and Forfeiture Officer
172.2	district director	Fines, Penalty, and Forfeiture Officer
172.12(a)	district director of Customs for the district in which	Fines, Penalty, and Forfeiture Officer for the port where
172.12(b)(1)	district director	Fines, Penalty, and Forfeiture Officer
172.21 heading	district director of Customs	Fines, Penalty, and Forfeiture Officer
172.21	district director	port director

Section	Remove	Add
172.22 heading, and (b)(3)(ii)	district director of Customs ..	Fines, Penalty, and Forfeiture Officer
172.22(a)	District directors	Fines, Penalty, and Forfeiture Officers
172.22(b)(3), and (d)(2) and (4)	district director	Fines, Penalty, and Forfeiture Officer
172.22(c), (d)(1), and (e)	district director	port director
172.31(a)	district director	Fines, Penalty, and Forfeiture Officer
	the regional commissioner of	.....
172.33(a) introductory text, (b)(1) heading and text, (b)(1)(ii), (b)(2), and (c)(1)	district director	Fines, Penalty, and Forfeiture Officer
172.33(b)(1)	regional commissioner of the region in which the district lies	designated Headquarters official
172.33(b)(1)(i)	regional commissioner	designated Headquarters official
173.1	District directors, or in the New York Customs Region, the Regional Commissioner of Customs,	Port directors
173.2 introductory text	district director	port director
173.3(a)	district director	port director
173.4(a)	district director	port director
173.4(c)	district director at	director of
	, or in the New York Customs Region, the Regional Commissioner of Customs,	.....
173.4a	district director	port director
173.5	district director	port director
173.6	district director	port director
174.0	district director	port director
174.1	terms	term
174.3(b)(1), (c), and (d)	district director	port director
174.11 introductory text	district director	port director
174.12(b) and (d)	district director	port director
174.12(d)	except that, when the entry underlying the decision protested is filed at a port other than the district headquarters, the protest may be filed with the port director of that port	.....
174.13(b)	in any district	at any port
	, as well as the ports of entry where they may not coincide,	.....
174.14(e)	district director or	.....
174.15(b)(2)	district director	port director
174.16	district director	port director
174.21	district director	port director
174.22(a), (c), and (d)	district director	port director

Section	Remove	Add
174.23	district director	port director
174.24 introductory text	district director	port director
174.24(a)	in any district	at any port
174.26(a), and (b) introductory text	district director	port director
174.26(b)(2)	the regional commissioner of Customs or his designee for the region in which the district lies. Such designee shall be a Customs officer	a designee of the port director
174.27	district director	port director
174.29	district director	port director
174.30(b) and (c)	district director	port director
175.25(a)	district director for	director of
	district director	port director
175.25(b)	district director	director
176.1	district director for each Customs district in which	director of each port where
177.1(d)(3)	field office (port, district or region)	port office
177.2(a)	Regional Commissioner of Customs, New York Region	Director, National Commodity Specialist Division, U.S. Customs
	Area or District	service port
177.2(b)(2)(ii)(A)	Area or District	service port
177.2(b)(2)(ii)(B)	New York Region or by other Area or District offices	Director, National Commodity Specialist Division, or any service port office
177.2(b)(2)(ii)(C)	Commercial Rulings	Tariff Classification Appeals
	New York Region and other Area and District Offices	Director, National Commodity Specialist Division, and any service port office
	New York Region or other Area or District offices	Director, National Commodity Specialist Division, or any service port office
177.22(c)	Director	Assistant Commissioner
191.2(d)	Regional commissioners of Customs	Drawback offices
191.2(f)	regional commissioner	drawback offices
191.10(a)	regional Regulatory Audit Division under the jurisdiction of the regional commissioner in whose region	director at whose port
	in the same region	at the same port

Section	Remove	Add
191.10(b)	in one region	at one port
	in another region, the regional commissioner	at another port, the port director
	regional commissioners in whose regions	port directors at whose ports
191.10(d)	Deputy Assistant Regional Commissioner (Regulatory Audit)	port director
191.10(e)(1)(i) heading and text, (e)(1)(ii), and (e)(2) heading and text	regional commissioner	port director
191.10(e)(1)(i)	Entry Rulings	Entry and Carrier Rulings
191.10(e)(1)(iii)	appropriate regional commissioner	port director
191.21(c)	regional commissioner	appropriate drawback offices
191.21(d)	regional commissioner	drawback office
191.21(e) heading	regions	drawback offices
191.21(e)	regional office	drawback office
191.22(d)	regional commissioner	drawback office
191.23(a)	regional commissioner	proper drawback office
191.23(b) heading	regions	drawback offices
191.23(b)	regional commissioner	drawback office
191.24	appropriate regional commissioner	drawback office
191.25(b)(1) and (2) introductory text	appropriate regional commissioner	drawback office which approved the original contract
191.26	applicable regional commissioner	applicable drawback office
	regions	drawback offices
	regional commissioner who	drawback office that
	appropriate regional commissioner	drawback office
191.42(b) introductory text	regional commissioner	drawback office
	him	it
191.43	regional commissioner	drawback office
191.44	applicable regional commissioner	drawback office
191.53(b)	regional commissioner	drawback office
	, unless in cases of merchandise the subject of same condition drawback, the regional commissioner has delegated authority to approve requests to a district director. In that circumstance, the request shall be made with the district director	

Section	Remove	Add
191.53(c)	regional commissioner, or the district director, if applicable in the case of merchandise the subject of same condition drawback,	port director
	he	it
191.53(d)	regional commissioner	drawback office
191.53(e)(3)	regional commissioner with whom drawback claims are filed	drawback office
191.56	regional commissioner	drawback office
191.57	district director	drawback office
191.62(a)(1) and (2) introductory text	district director	drawback office
191.62(a)(3) heading	regions	drawback offices
191.62(a)(3)	in a region	at a drawback office
	regional commissioner with whom	drawback office where
	regional commissioner	drawback office
191.64	regional commissioner	appropriate drawback office
191.65(a)	regional commissioner	drawback office
191.66(e)	regional commissioner	drawback office
191.67(a)(1)	district director at	director of
	, or the regional commissioner for the region where the drawback claim is liquidated,	
191.67(e)(1)	regional commissioner through the district director	requiring Customs authority
	regional commissioner	requiring Customs authority
191.67(e)(2) heading and text	district director	port director
191.71(d) and (f)	regional commissioner	drawback office
191.72(b) and (c)	regional commissioner	drawback office
191.72(c)	regional commissioner who	drawback office that
191.82(d)(2)	regional commissioner	drawback office
191.83(b)(2)(vi) and (b)(3)	Customs region	Drawback office
191.84(a)	regional commissioner of Customs	Customs drawback office
191.84(b)(9)	Customs region	Drawback office
191.84(d)	in another region	at another drawback office
	regional commissioner of Customs	drawback office
	regional office	drawback office
	regional commissioner	drawback office
191.85	regional commissioner	drawback office
191.93(a)	district director at the port of lading	drawback office
191.93(c)(5)	Customs region	Drawback office

Section	Remove	Add
191.93(d), (e)(2) and (4), (h), and (j)(4)	district director	drawback office
191.93(g)	district director at the port of lading	drawback office
191.93(i) and (j)	regional commissioner	drawback office
191.93(j)(4) heading	District Director's	Drawback office's
191.133(a), (c), and (d)(2)	district director	appropriate Customs office
191.134	district director	drawback office
191.134(b)	district director at	Customs office at
191.136(d)	regional commissioner, through the district director,	drawback office
	regional commissioner	drawback office
	he	such office
	Headquarters, U.S. Customs Service	the Office of Field Operations, Customs Headquarters
191.136(e)	Regional commissioners	Drawback offices
191.138	regional commissioner	drawback office
191.141(b)(1)	regional commissioner, or the district (area) director, or port director, if authority has been delegated to that official by the regional commissioner,	drawback office
191.141(b)(2)(i)	regional commissioner or the district (area) director, or port director, if authority has been delegated to that official by the regional commissioner,	drawback office
191.141(b)(2)(ii)	regional commissioner, or the district (area) director or port director, if authority has been delegated to that official by the regional commissioner	drawback office
191.141(d)	regional commissioner, or the district (area) director, if authority has been delegated to that official by the regional commissioner,	drawback office
191.141(f)(1)	regional commissioner, or the district (area) director or port director, if authority has been delegated to that official by the regional commissioner,	drawback office
191.141(f)(2)	district director or his designee	any Customs officer
191.141(g)(1)	in the region or districts as determined by the regional commissioner	by the applicable drawback office
191.142(b)(1) and (3)	district director	drawback officer
191.142(b)(3)	he	it

Section	Remove	Add
191.142(b)(4)	district director or other appropriate Customs official	drawback office
191.142(b)(5)	district director who	drawback office that
191.153(b)	district director	drawback office
191.156(b)	district director	drawback office
191.158	district director	drawback office
191.163(b)(2), and (c) heading and text	district director	drawback office
191.164(b) and (c)	district director	drawback office
191.165(b) and (c)	district director	drawback office

GEORGE J. WEISE,
Commissioner of Customs.

Approved: September 11, 1995.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, September 27, 1995 (60 FR 50020)]

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19 CFR Parts 10, 12, 24, 123, 134, 162, 174, 177, 178, 181, and 191

(T.D. 95–68)

RIN 1515–AB33

NORTH AMERICAN FREE TRADE AGREEMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to the document published in the Federal Register that adopts as a final rule, with some changes, interim amendments to the Customs Regulations to implement the preferential tariff treatment and other Customs-related provisions of the North American Free Trade Agreement (NAFTA) and the North American Free Trade Agreement Implementation Act. The correction concerns the discussion of a comment in the Background portion of the document regarding the calculation of NAFTA drawback.

EFFECTIVE DATE: This correction is effective October 1, 1995.

FOR FURTHER INFORMATION CONTACT: William Rosoff, Entry Rulings Branch (202–482–7040).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 6, 1995, Customs published in the Federal Register (60 FR 46334) T.D. 95–68 to adopt as a final rule, with some changes, interim amendments to the Customs Regulations implementing the preferential tariff treatment and other Customs-related provisions of the North American Free Trade Agreement (NAFTA) and the North American Free Trade Agreement Implementation Act, Public Law 103–182, 107 Stat. 2057. These final NAFTA implementing regulations take effect on October 1, 1995.

The SUPPLEMENTARY INFORMATION portion of T.D. 95–68 included a detailed discussion of the public comments submitted to Customs on the interim NAFTA implementing regulations. One such comment concerned interim § 181.44(b) and stated, with reference to a specific example, that the regulation was unclear as to the calculation of NAFTA drawback (that is, with regard to how the required duty comparison is to be made) when two or more components are used in the process of manufacture. The Customs response to this comment included a general statement of the principle to be applied and also stated that a new paragraph (b) was being added to § 181.44 to set forth the relative value calculation and individual comparison principle.

On further review of the response to the submitted comment, Customs has determined that the response neither specifically addressed the example provided in the comment nor adequately expressed the principle reflected in the new paragraph (b) text. This document corrects the Customs response in question accordingly.

CORRECTION OF PUBLICATION

In the document published in the Federal Register as T.D. 95–68 on September 6, 1995 (60 FR 46334), on page 46339, under the heading "Section 181.44(b)", the paragraph beginning at the bottom of the first column and ending at the top of the second column before the example is corrected to read as follows:

Customs Response:

With respect to the duty comparison referred to in the comment, the comparison should be made between the total duty paid on all imported materials or component parts and the duty paid on the finished article exported to Canada or Mexico: in the example cited by the commenter, the total duty of $6.00 paid on the two imported parts would be compared to the $5.00 in Canadian or Mexican duty paid on the exported finished article, resulting in $5.00 in drawback. Where multiple finished articles are produced from one imported component or material, relative value will be used to determine how the comparison is to be made between the duty paid on the imported component or material and the duty paid on each individual exported finished article.

Section 181.44, as set forth below, has been modified by redesignating paragraphs (b)–(e) as (c)–(f) and adding a new paragraph (b) which sets forth the relative value calculation and individual comparison principle and includes the following example to illustrate the rule where multiple articles are produced from one component or material.

Dated: September 14, 1995.

HARVEY B. FOX,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, September 20, 1995 (60 FR 48645)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, September 19, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF A SCRUB CLOTH

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a scrub cloth. Notice of the proposed revocation was published August 9, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 32.

EFEECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 4, 1995.

FOR FURTHER INFORMATION CONTACT: Cathy Braxton, Textile Classification Branch (202) 482–7048.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 9, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 32, proposing to revoke New York Ruling

Letter (NYRL) 839372, concerning the tariff classification of a scrub cloth. No comments were received from interested parties.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs is revoking NYRL 839372 to reflect proper classification of the scrub cloth in subheading 6302.93.2000 of the Harmonized Tariff Schedule of the United States Annotated, which provides for toilet linen of man-made fibers. HRL 958142, revoking NYRL 839372, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177. 10(c)(1), Customs Regulations (19 CFR 177.l0(c)(1)).

Dated: September 8, 1995.

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, September 18, 1995.

CLA–2 R:C:T 958142 CAB
Category: Classification
Tariff No. 6302.93.2000

MR. RONALD JACOBSEN
YUSEN AIR & SEA SERVICE (U.S.A.) INC.
590 Supreme Drive
Bensenville, IL 60106

Re: Revocation of NYRL 839372, dated April 20, 1989; classification of toilet linen; scrub cloth.

DEAR MR. JACOBSEN:

This is in reference to New York Ruling Letter (NYRL) 839372, dated April 20, 1989, issued to you from New York Customs. Customs has reexamined the decision and determined that the decision was in error. NYRL 839372 classified the merchandise in subheading 6307.90.9030 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Customs believes it should be revoked to reflect the correct tariff classification in subheading 6302.93.2000, HTSUSA. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 839372 was published August 9,1995, in the CUSTOMS BULLETIN, Volume 29, Number 32.

Facts:

The sample at issue is described as a "Saluk" cloth. The cloth is constructed of 100 percent nylon loosely woven fabric and measures approximately 34½ inches long by 11½ inches wide. According to the illustration wrapper it will be used as a massager.

Issue:

What is the proper tariff classification for the subject merchandise?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6302, HTSUSA, provides for, inter alia, toilet linen. The Explanatory Notes to the Harmonized Commodity Description and Coding System, although not legally binding, are the official interpretation of the tariff at the international level. The EN to Heading 6302, HTSUSA, state that "this heading includes articles that are usually made of cotton or flax, but sometimes also of hemp, ramie or man-made fibres, etc; they are normally of a kind suitable for laundering." They include, "toilet linen, e.g., hand or face towels (including roller towels), bath towels, beach towels, face cloths and toilet gloves."

Heading 6307, HTSUSA, provides for other made up articles. Heading 6307, HTSUSA, is a residual provision for textile articles not otherwise more specifically provided for in the nomenclature.

The subject cloth is similar to toilet linen, which the EN indicates can include items such as hand and face cloths, and toilet gloves. The advertising data for the subject cloth states that it is "ideal for cleaning the entire body and the special texturizing stimulates skin and blood circulation."

In Headquarters Ruling Letter (HRL) 950104, dated October 18,1991, Customs classified a cloth containing an open weave and rough texture under Heading 6302, HTSUSA. Similarly, in HRL 087148, dated July 2, 1990, Customs classified a cloth constructed of 100 percent polyester abrasive material backed with a pocket of satin-like material and terry cloth as a facial mitt under Heading 6302, HTSUSA. The articles which were the subject of both of the aforementioned rulings were intended to be used to exfoliate the skin in the bath and shower. As the subject cloth is also used in the bath or shower for exfoliating and is similar in appearance to the aforementioned cloths, it is also classifiable under Heading 6302, HTSUSA, as toilet linen. As the subject cloth is more specifically provided for under Heading 6302, HTSUSA a determination of classification under Heading 6307, HTSUSA, is not necessary.

Holding:

The subject cloth is properly classifiable in subheading 6302.93.2000, HTSUSA, which provides for bed linen, table linen, toilet linen and kitchen linen; of man-made fibers; other. The applicable rate of duty is 11.2 percent *ad valorem* and the textile restraint category is 666.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

NYRL 839372 is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER RELATING TO CLASSIFICATION OF WOMEN'S OVERSIZED T-SHIRT STYLE GARMENT'S

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of certain women's cotton knit oversized T-shirt style garments. Notice of the proposed revocation was published August 9, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after December 4, 1995.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202 482–7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 9, 1995, Customs published notice in the CUSTOMS BULLETIN, Volume 29, Number 32, proposing to revoke District Decision (DD) 801733 of September 28, 1994, which classified certain women's cotton knit oversized T-shirt style garments as knit pullovers of heading 6110, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response to this notice.

At the request of counsel for the importer, Customs reviewed the decision in DD 801733 and examined sample garments. Upon review, Customs determined the garments are properly classified as women's cotton knit sleep shirts of heading 6108, HTSUS. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking DD 801733.

Headquarters Ruling Letter 957634 revoking DD 801733 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Custom Regulations (19 CFR 177.10(c)(1)).

Dated: September 13, 1995.

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, September 13, 1995.

CLA–2 R:C:T 957634 CMR
Category: Classification
Tariff No. 6108.31.0010

DIANE WEINBERG, ESQ.
SANDLER, TRAVIS & ROSENBERG, P.A.
505 Park Avenue
New York, NY 10022–1106

Re: Revocation of District Decision (DD) 801733; Classification of over-sized T-shirt; pullover V. nightshirt; headings 6110 v. 6108.

DEAR MS. WEINBERG:

This is in response to your letter of February 17, 1995, on behalf of Tru-Trade International, Inc., (hereinafter Tru-Trade) requesting reconsideration of DD 801733 of September 28, 1994, which classified two women's knit pullover garments as pullovers of heading 6110, Harmonized Tariff Schedule of the United States (HTSUSA). You submit that the garments are nightshirts and submitted two samples with your request. The garments are imported from El Salvador.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of DD 801733 was published August 9, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 32.

Facts:

The garments at issue, styles 8816 and 5921, were described in DD 801733 as:

> "* * * women's 100 percent cotton, jersey knit, oversize shirts with crew neck, short sleeves and a hemmed bottom."

The submitted garments fit this description. They extend to the knees and have the appearance of oversized T-shirts. The submitted garments are sized extra large and extra, extra large, though Customs has been informed the imported garments are sized 1X, 2X, and 3X, and will measure 26, 28 and 30 inches wide, respectively, at the chest. The submitted garments measure approximately 36 inches in length and 26 to 28 inches wide at the chest area. One sample is printed and one sample is not printed. The garments are imported without the screen printing. In Miami, the garments are screen printed with licensed Looney Tunes characters.

The garments are imported by Tru-Trade, screen printed, and sold to Seabell Sportswear (hereinafter Seabell). Seabell sells the garments to Kmart for sale in Kmart's juniors' and ladies' sleepwear department. In support of your argument that the submitted garments are sleepwear, you have submitted copies of invoices from the foreign manufacturer to Tru-Trade, a purchase order from Seabell Sportswear to Tru-Trade, an invoice from Tru-Trade to Seabell Sportswear, and an amendment to a purchase order from Kmart to Seabell Sportswear.

Issue:

Are the submitted garments classifiable as pullovers of heading 6110, HTSUS, or as nightshirts of heading 6108, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to (the remaining GRIs taken in order)."

Heading 6108 provides for, among other things, women's knitted or crocheted nightdresses, pajamas and similar articles. Heading 6110 provides for, among other things, knitted or crocheted pullovers. The Explanatory Notes for the Harmonized Commodity Description and Coding System (EN) do not offer much assistance in this particular case regarding the headings at issue.

When determining the classification of a garment, the most persuasive evidence is the garment itself. The court in *Mast Industries v. United States*, 9 CIT 549, 552 (1985), *aff'd*, 786 F. 2d 1144 (1986), noted that "the merchandise itself may be strong evidence of use." *United States v. Bruce Duncan Co.*, 50 CCPA 43, 46, C.A.D. 817 (1963). Additionally in *Mast, supra*, at 552, the court noted the definition of "nightwear" as "garments to be worn to bed." The court held that the particular garment at issue therein was classifiable as nightwear since it was designed, manufactured marketed and used as nightwear.

In regard to the garments at issue, classification must be based upon the condition of the garments at the time of importation. This is a basic tenet of tariff classification. See, *Donalds Ltd., Inc. v. United States*, 32 Cust. Ct. 310, 314, C.D. 1619 (1954).

The subject garments are imported without screen printing. In their condition as imported, they are basically very oversized T-shirts without any ornamentation. In determining the proper classification of the garments, Customs must classify the garments based upon their condition at the time of importation and not consider the screen printing which occurs after importation.

Thus, Customs must decide if the garments at issue, at the time of importation, are garments that are used as sleepwear. In addition, that use must be the principal use in the United States of goods of the same class or kind to which the imported garments belong.

As noted above, the garment itself may be persuasive evidence as to its proper classification. The oversized T-shirts are made of a soft, cotton, jersey knit fabric. The garments are designed for wear by average-size women and teens and not designed or targeted for sale specifically to larger sized women or teens. Therefore, it is apparent the garments are designed to be very loose-fitting. In addition, the garments are mid-knee length on a medium size mannequin. Knee length is common for nightshirts.

Although based upon the garments physical characteristics they would seem quite suitable for use as sleepwear, the physical characteristics alone in this case are not conclusive. Therefore, Customs will look at the additional information submitted to support the claim these garments are sleepwear and principally used as such.

In support of the claimed classification as sleepwear, you have submitted invoices and purchase orders from all parties involved in the transactions starting from the manufacturing of the subject garments to their purchase by a retailer for sale. In all the submitted documents, the garments are referred to either as nightshirts or dorm shirts.

In HRL 950503 of June 19, 1992, Customs stated in regard to documentary evidence submitted to support a classification claim:

> [It] should be noted that Customs recognizes that internal documentation and descriptions on invoices may be self-serving and should be considered in totality with other evidentiary information. Indeed, the Court of International Trade in ruling on the classification of certain garments known as "leggings" noted: "The court is not highly persuaded by plaintiffs invoices or advertising calling the items 'tights.' To avoid pants quota limitations plaintiff must refer to the items as 'tights.'" *Regaliti Inc. v. United States*, Slip Op. 92–80, at 5. Therefore, while Customs will recognize and consider the descriptions on internal documents and invoices presented, it will not view them as determinative of a classification, but merely a consideration.

While Customs will consider advertising and documentation such as invoices and purchase orders, we recognize that such material may be self-serving. Therefore, Customs will consider submitted documentation, but it is only one factor and not determinative of the classification of a garment. Customs must determine the classification based upon the totality of the evidence and primarily based upon the garment itself.

In HRL 951628 of August 12, 1992, and HRL 953591 of June 3, 1993, Customs classified similar garments which were also known as "dorm shirts". The garments were described as 100 percent cotton knit oversized T-shirts, measuring approximately 38 inches in length and 26 inches across the chest. In HRL 951628 and HRL 953591, the garments were screen printed on the front with either a heart design or a sheep design. In those rulings, Customs classified the dorm shirts as women's sleepwear.

In reaching its classification decision in HRL 951628 and HRL 953591, Customs considered not only the garments and their suitability for use as sleepwear (the claimed classification), but also information including advertising material, the department in which the garments were displayed (the sleepwear department), a statement from the retail buyer as to the purpose for which the garments were purchased and how they would be marketed, and the presence of a hang tag clearly associating the garments with sleep and bedtime.

The differences between the garments at issue in HRL 951628 and 953591, and the garments at issue here are slight differences in the measurements of the garments, i.e, the garments in the earlier rulings were slightly longer; and the garments at issue here enter without any screen printing, i.e., they are blank at the time of entry.

The information before us substantiates your claim that from the time of manufacture until the time of sale, the subject garments are designed and intended for use as sleepwear. The physical characteristics of the garments, such as, the soft cotton jersey knit fabric, the knee length, and oversized chest widths, make the garments particular suitable for use as sleepwear. The length of the garments, in particular, make it unlikely, though not impossible, that the garments would be worn as outerwear. The Court of International Trade pointed out in *Mast*, at 551, "that most consumers purchase and use a garment in the manner in which it is marketed."

Customs is satisfied from the submitted evidence that the garments at issue in this case are designed, manufactured, and marketed as sleepwear. We concede that as most consumers will use the garment for the purpose for which it is marketed, the garments at issue will be principally used as nightwear. As such, the subject garments belong to the class or kind of garments known as nightwear or sleepwear. Their condition at the time of importation as blank, that is, without screen printing, does not alter our view.

Holding:

DD 801733 of September 28, 1994 is hereby revoked. The garments at issue therein, styles 8816 and 5921, are classified as women's cotton knit sleep shirts in subheading 6108.31.0010, HTSUSA, textile category 351, dutiable at 9 percent ad valorem. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c) (1)).

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF MEN'S WOVEN UPPER GARMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of certain men's woven upper garments. Notice of the proposed modification was published August 9, 1995, in the CUSTOMS BULLETIN.

DATE: Merchandise entered or withdrawn from warehouse for consumption on or after December 4, 1995.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 9, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 32, proposing to modify District ruling letter (DD) 897326, dated May 26, 1994. That ruling classified three styles of men's woven upper garments as shirts, in heading 6205, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). This office has reviewed the decision in DD 897326 and it is our opinion that it is in error as it pertains to one of the style numbers, i.e., style number F4774. It is the opinion of this office that style number F4774 is more specifically provided for in heading 6211, HTSUSA, as a shirt which is excluded from classification in heading 6205, HTSUSA.

No comments were received in response to our notice of intent to modify DD 897326.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying DD 897326 to reflect the proper classification of style number F4774 in heading 6211, HTSUSA. HQ 957877 modifying DD 897326 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10 (c)(1)).

Dated: September 14, 1995.

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, September 14, 1995.

CLA–2 R:C:T 957877 jb
Category: Classification
Tariff No. 6211.32.0060

MR. WILLIAM F. SULLIVAN
MSAS CUSTOMS LOGISTICS, INC.
150–16 132nd Avenue
Jamaica, NY 11434

RE: Modification of DD 897326; men's woven upper garment; EN to chapter 62, HTSUSA; shirts must have a full or partial opening at the neckline.

DEAR MR. SULLIVAN:

On May 26, 1994, Customs issued to you, on behlalf of your client Glint, Inc., District ruling (DD) 897326 regarding the classification of three styles of men's upper garments. Upon review of that ruling we have determined that it is in error as it pertains to style number F4774.

Pursuant to section 623, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–82, 107 Stat. 2037, 2186 (1993) (hereinafter section 625), notice of the proposed modification of DD 897326 was published August 9, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 32.

Facts:

The merchandise at issue, referenced style number F4774, is a men's cotton upper pullover garment constructed of two types of fabric. The woven top portion is composed of 70 percent cotton and 30 percent polyester, and the bottom portion is composed of a terry knit fabric of 65 percent polyester and 35 percent cotton. The garment features a round ribbed neck opening, a ribbed bottom, long sleeves with ribbed cuffs and a slit pocket on the left chest.

In DD 897326 all the submitted garments, including style number F4774, were classified in heading 6205, HTSUSA, as men's woven shirts.

Issue:

Whether the subject garment is properly classified in heading 6203, HTSUSA, as a men's shirt or in heading 6211, HTSUSA, as an other garment?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall he determined according to the rules of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot he classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

Heading 6205, HTSUSA, provides for men's or boys' shirts. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to chapter 62, HTSUSA, state:

> Shirts and shirt-blouses are garments designed to cover the upper part of the body, having long or short sleeves and a **full or partial opening starting at the neckline.** Emphasis added.

Subject style number F4774 features a round ribbed neck opening. As it lacks the requisite "full or partial opening at the neckline" explicitly stated in the EN to heading 6205, HTSUSA, it is precluded from classification in heading 6205, HTSUSA. Accordingly, DD 897326 will be modified to reflect the proper classification of style number F4774.

Style number F4774 is properly classifiable in heading 6211, HTSUSA, which provides for, among other things, men's or boys' other garments.

Holding:

The subject garment, referenced style number F4774, was improperly classified in DD 897326. DD 897326 is hereby modified to reflect the proper classification of style number

F4774 in subheading 6211.32.0060, HTSUSA, which provides for, other garments, men's or boys': of cotton; shirts excluded from heading 6205, HTSUSA. The applicable rate of duty is 8.6 percent *ad valorem* and the quota category is 340.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may he affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, we suggest your client check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)* an issuance of the Customs Service which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office to determine the current status of any import restraints or requirements.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or Position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

U.S. Court of Appeals for the Federal Circuit

AMERICAN ALLOYS, INC., ELKEM METALS CO., GLOBE METALLURGICAL, INC. AND SKW ALLOYS, INC., PLAINTIFFS/CROSS-APPELLANTS, AND SIMETCO, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 93–1518 and 93–1539

(Decided July 27, 1994)

Charles H. Darling, IV, Baker & Botts, L.L.P., of Washington, DC, argued for plaintiffs/cross-appellants. With him on the brief were *William D. Kramer* and *David E. Maranville.* Of counsel were *Stephen L. Teichler, Martin Schaefermeier, Michael X. Marinelli* and *lifford E. Stevens.*

A. David Lafer, Senior Trial Counsel, Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were *Frank W. Hunger,* Assistant Attorney General and *David M. Cohen,* Director. Also on the brief were *Stephen J. Powell,* Chief Counsel for Import Administration, *Berniece A. Browne,* Senior Counsel for Antidumping Litigation and *Robert S. Nielsen,* Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

Before NEWMAN, *Circuit Judge,* SKELTON, *Senior Circuit Judge,* and RADER, *Circuit Judge.*

RADER, *Circuit Judge.*

Domestic producers of silicon metal, including American Alloys, Inc., initiated an antidumping complaint against their Argentine competitor, Electrometalurgica Andina, S.A.I.C. (Andina). The Department of Commerce (Commerce) determined Andina sold silicon metal at less than fair value. Commerce, however, reduced Andina's dumping margin to account for rebated taxes. On review, the Court of International Trade determined that Commerce erred by not calculating the actual amount of the rebated taxes passed on to domestic consumers of Andina's products. *American Alloys, Inc. v. United States,* 810 F. Supp. 1294 (Ct. Int'l Trade 1993).

Based on statutory construction, this court reverses the Court of International Trade's holding that the rebated taxes were automatically applicable for a reduction of the dumping margin. Commerce adequately determined that Argentina taxes were included in the domestic price. Therefore, this court reverses the trial court's decision that Commerce must calculate the pass-through tax incidence for the rebates.

BACKGROUND

In August 1990, American Alloys petitioned Commerce to impose antidumping duties on silicon metal imports from Argentina. Commerce initiated an investigation and determined that Andina sold silicon metal in the United States at less than fair market value.

To determine the fair market value, Commerce assessed the domestic price of silicon metal products in Argentina. The price of silicon metal products in Argentina included several domestic taxes. For exported goods, Argentina either does not assess these taxes or grants a rebate upon export under the "Reembolso" program. The Reembolso program covered national taxes for, among others, the Export Promotion Fund, the Tire Tax, the Truck Engine Tax, the Retirement Fund, the Public Works Fund, the Social Assistance Fund, the Family Subsidies Fund, the National Housing Fund, and Real estate Taxes.

Commerce verified that Andina's domestic prices for silicon metal products included taxes covered by the Reembolso program. Commerce analyzed the legal requirements of the Reembolso program, required Andina to answer a questionnaire about the taxes, and examined shipping licenses including applications for the rebate. Finally, Commerce analyzed a sales transaction to verify that the rebated taxes were included in the price. Commerce concluded that these inquiries verified that the price of Andina's domestic products was 12.5% higher than the price of exports due to the rebates for "Reembolso" taxes on exported goods.

Commerce did not, however, conduct an inquiry to determine whether Argentina directly imposed the rebated taxes on the exported silicon metal and whether Andina actually passed these taxes on to its domestic consumers in the form of higher prices. According to Commerce, this form of physical incorporation inquiry occurs in a countervailing duty investigation, which American Alloys had not requested.

In *Final Determination of Sales at Less Than Fair Value: Silicon Metal from Argentina,* 56 Fed. Reg. 37,891, 37,895 (Dep't Comm. Aug. 9, 1991), Commerce found that silicon metal from Argentina was sold at less than fair value. In setting the dumping margin, Commerce increased the United States Price by 12.5% to offset the Reembolso tax rebate. *American Alloys,* 810 F. Supp. at 1295. This adjustment reduced the dumping margin on Andina's United States export sales. *Id.*

Before the Court of International Trade, American Alloys moved for judgment on the agency record under 28 U.S.C. § 1581(c) (1988). American Alloys contended that Commerce should not have reduced the dumping margin because Argentina did not directly impose these Reembolso taxes on silicon metal products. Commerce defended its position by pointing out that this form of physical incorporation inquiry occurs in a countervailing duty investigation. Because American Alloys did not request a countervailing duty investigation, Commerce saw no necessity to perform any type of physical incorporation inquiry nor to determine if the taxes were imposed directly on the product or its

components. The trail court sustained Commerce's action. American Alloys appealed that judgment.

American Alloys also argued that Commerce should not have reduced the dumping margin without verifying the direct imposition of Reembolso taxes on Andina's domestic customers. The trial court agreed and ordered Commerce to measure the tax incidence of qualifying taxes under the Reembolso program.

DISCUSSION

The trial court must uphold Commerce's rulings unless the rulings are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988); *Creswell Trading Co. v. United States,* 15 F.3d 1054, 1056, ____ Fed. Cir. (T) ____, ____ (1994). In determining whether the trial court correctly reached its decision, this court reapplies the statutory standard of review to Commerce's ruling. *Koyo Seiko Co. v. United States,* 20 F.3d 1160, 1164, ____ Fed. Cir. (T) ____, ____ (1994). Consequently, this court makes its own determination of whether substantial record evidence supports the agency's determinations in accordance with the law. *Id.*

The United States antidumping laws remedy international price discrimination to prevent injury to domestic industries. *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1576, ____ Fed. Cir. (T) ____, ____ (1993). The Trade Reform Act of 1973 (the Act) imposes duties on imported merchandise that is or is likely to be sold in the United States at less than the fair market value of those goods in the country of manufacture. 19 U.S.C. § 1673 (1988).

The Act authorizes the Secretary of Commerce to investigate charge of dumping *Zenith,* 988 F.2d at 1576. If an investigation discloses dumping, the Secretary imposes a duty when import sales materially injure, threaten to materially injure, or materially retard the establishment of an industry in the United States. *Id.* The duty is the difference between foreign market value (FMV) of the goods and the value of those goods in the United States, known as United States price (USP). *Id.* This difference is also the "dumping margin." Thus, the duty corrects the dumping margin. *Id.*

The Act permits numerous adjustments to FMV and USP to account for differences between these two value measurements unrelated to dumping. *See, e.g.,* 19 U.S.C. §§ 1677a(d), 1677a(e), 1677b(a)(1), 1677b(a)(4) (1988). Thus, the Act prevents distortions in the dumping margin. *See Smith-Corona Group v. United States,* 713 F.2d 1568, 1571–72, 1 Fed. Cir. (T) 130, 132–33 (1983), *cert. denied,* 465 U.S. 1022 (1984) (pointing out that FMV and USP are subject to adjustments in an attempt to reconstruct the price at a specific, common point in the chain of commerce). To avoid distortion of dumping margins merely because the exporting country taxes home market sales but not export sales, the antidumping laws permit offsetting adjustments to the USP. 19 U.S.C. § 1677a (1988). Otherwise these taxes would raise the apparent cost of the merchandise in the home country in comparison to the United

States price. This discrepancy in value would not correspond to dumping at all. Therefore, the Act offsets the domestic taxes by increasing the USP for:

> the amount of any taxes imposed in the country of exportation *directly upon the extorted merchandise or components thereof,* which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are *added to or included in the price* of such or similar merchandise when sold in the country of exportation.

19 U.S.C. § 1677a(d)(1)(C) (1988) (emphasis added).

DETERMINATION OF DIRECT TAXES

The Act specifies that the offset applies to taxes imposed "directly upon the exported merchandise or components thereof." *Id.* The statute thereby permits rebates only for direct domestic taxes. *Id.* A direct tax is, by definition, a tax "imposed directly upon property, according to its value." *Black's Law Dictionary* 461 (6th ed. 1990). Accordingly, to qualify for a rebate, the Act requires a direct relationship between the tax and the exported product or components of the exported product.

The Act does not explicitly set forth an interpretation of this direct relationship. However, the statute, as plainly written, expresses the clear and unambiguous intent of Congress to permit rebates only for a domestic tax that qualifies as a direct tax on the export or on components that are part of the export. Where the language of the stature "is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Moreover, the legislative history of the Act directly supports this meaning.

Prior to the 1974 amendments, the USP was subject to adjustment for taxes imposed *"in respect to the manufacture, production, or sale of the merchandise."* H.R. Rep. No. 571, 93d Cong., 1st Sess. 69–70 (1973) (emphasis in original). Addition of these taxes to the USP reduced or eliminated any dumping margins that actually existed. *Id.* at 70. The wording of the 1974 Act restricted those rebates that decreased the size of the dumping duties. *See id.* The House Report states that:

> [n]o adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated.

Id. at 69.

The Senate Hearings evidenced a similar interpretation during questioning of the Secretary of the Treasury, at that time in charge of dumping and countervailing duty investigations. The agency head indicated that:

> The proposed amendments to the Antidumping Act would tighten the existing guidelines for adding back rebated or remitted taxes to

> purchase price or exporters sales price * * *. If it were to be determined in a particular instance that such taxes are not directly imposed upon the merchandise * * * they will not be added to purchase price or exporter's sales price. In such circumstances the amendment in question would tend to create or increase the size of dumping margins.

Trade Reform Act of 1973, Hearings before the Senate Committee on Finance on H.R. 10710, 93d Cong., 2d Sess. 504–05 (1974).

According to the Senate Hearings:

> The definitions of both "purchase price" and "exporter's sales price" are amended to harmonize the treatment of foreign tax rebates under the Anti-dumping act with the standard for their treatment under the countervailing duty law. No adjustment for tax rebates to the advantage of the foreign exporter will be permitted unless the direct relationship between the tax and the exported product or its components can be demonstrated. For example, if the exported product benefited from a tax rebate on the mortgage on the plant that produced it, the rebate could not be used in the computations to reduce the dumping margin.

Trade Reform Act of 1973, Hearings before the Senate Committee on Finance on H.R. 10710, 93d Cong., 2d Sess. 310 (1974).

The wording of the statute as well as its enactment history evinces an intent by Congress to permit adjustment to the USP only upon demonstration of a direct relationship between the tax and the commodity or its components. The statute does not evince an intent to forgo a determination of physical incorporation in the absence of a companion countervailing duty investigation. Nor does the legislative history provide evidence of such an intent. Rather, the legislative history suggests just the opposite.

The internal taxes providing the basis for the Reembolso program included taxes characterized as: Export Promotion Fund; Tire Tax; Truck Engine Tax; Retirement Fund; Public Works Fund; Social Assistance; Family Subsidies; National Housing Fund; and Real Estate Taxes. The nature of taxes included in the Reembolso program suggest that they may not qualify as a direct tax. Without evidence that they are direct taxes, it is unlawful to utilize the rebates to increase the USP. In performing its duty, Commerce did not determine if a direct relationship existed between the rebated taxes and the silicon metal. The Court of International Trade also did not enforce this requirement of the statute.

Moreover, one of the stated purposes of the 1974 amendments was to "conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes." Report of the Committee on Ways and Means on H.R. 10710, H.R. Rep. No. 571, 93d cong., 1st Sess. 69 (1973). If harmonization is the goal, it makes little sense to utilize one set of rules when there is a countervailing duty investigation and another when there is not.

This court finds no support in the 1974 amendments for permitting Commerce to ignore the qualifying taxes standard and to return to the

pre-1974 standard in the absence of a companion countervailing duty case. Rather, Congress required, before adjustment of the USP for a rebated tax, that the tax must meet the same test as a tax rebate would meet to avoid a countervailing duty. The tax must bear a direct relationship to the exported product or a physically incorporated component of that product. Commerce may not adjust the USP for tax rebates "unless the direct relationship of the tax to the product being exported, or components thereof [can] be demonstrated. *Id.* The presence or absence of a companion countervailing duty investigation does not affect this burden.

Because Commerce did not determine if Argentina imposed the Reembolso taxes "directly upon the exported merchandise or components thereof," Commerce lacked authority to raise the USP for the rebates. This court reverses the trial court's holding that Commerce need not conduct an inquiry to determine if the rebated taxes were imposed directly on the merchandise at issue and remands for a determination of whether the Reembolso taxes qualify as direct taxes.

Inclusion in the Foreign Market Value

Even if Argentina directly imposed the rebated taxes upon the exported merchandise or its components, the Act requires satisfaction of a second prong before increasing the USP. The Act only adjusts USP for taxes that "are added to or included in the price of such or similar merchandise when sold in the country of exportation." 19 U.S.C. § 1677a(d)(1)(C). In reviewing whether Commerce demonstrated that Andina included these taxes in its home market prices, this court must determine whether substantial evidence supports the agency's position. *See Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933, 3 Fed. Cir. (T) 44, 51 (1984). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita,* 750 F.2d at 933 (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

In view of the language of 19 U.S.C. § 1677a(d)(1)(C), Commerce must calculate and verify the amount of taxes that are passed through to the home market consumer in making the agency's final determination. 19 U.S.C. § 1677e(b)(1). The question unanswered by the statute, and open to interpretation by Commerce, is the proper means for verification.

Daewoo Electronics v. International Union, 6 F.3d 1511, ___ Fed. Cir. (T) ___, (1993) addressed the calculation and verification of pass-through tax incidence for the rebated taxes. *Daewoo* held that Commerce need not perform an econometric study to calculate whether home market price included the taxes. The *Daewoo* court indicated:

> If an exporter's records show that a tax was either a separate "add on" to the domestic price or, although not separately stated, was, in fact, included in the price and that the taxes were paid to the government, that satisfies the tax inquiry required by the statute for an adjustment of the USP.

Id. at 1516–17. Moreover, the statute gives Commerce wide latitude in its verification procedures. *See Hercules, Inc. v. United States,* 673 F. Supp. 454, 469 (Ct. Int'l Trade 1987); *Kerr-McGee Chem. Corp. v. United States,* 739 F. Supp. 613, 628 (Ct. Int'l Trade 1990).

To verify addition of the rebates to the price in the home market, Commerce analyzed the Argentine decree creating the Reembolso program. The agency determined that the taxes fell within the category covered by the Reembolso program. Moreover, Commerce examined the exporter's responses to a questionnaire formulated by the agency, examined an export shipping license with the terms and application of the rebate, and finally, analyzed a sales transaction to verify the base rate of the rebate. This evidence, along with the presumption that a company passes on costs to its consumers, constitutes substantial evidence in support of Commerce's position.

Acting without the benefit of *Daewoo,* the Court of International Trade held that Commerce must undertake a tax pass-through analysis. *American Alloys,* 810 F. Supp. at 1301. The court required Commerce to measure tax absorption in the foreign country. *Id.* at 1300. Such a position conflicts with *Daewoo,* an opinion this court issued after the trial court's decision. In *Daewoo,* this court acknowledged Commerce's discretion under the Trade Act:

> [The Act] establishes an intricate framework for the imposition of antidumping duties in appropriate circumstances. The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor. The Secretary of Commerce (Secretary) has been entrusted with responsibility for implementing the antidumping law. The Secretary has broad discretion in executing the law.

Daewoo, 6 F.3d at 1516, (quoting *Smith-Corona,* 713 F.2d at 1571). Given the record evidence, this court detects no error in Commerce's conclusion that Andina actually passed the rebated taxes through to its home country consumers. Substantial evidence supports Commerce's conclusion. This court reverses the trial court's rejection of Commerce' s verification procedures.

CONCLUSION

This court reverses the trial court's ruling that Reembolso taxes can be treated as direct taxes without a direct tax analysis. This court reverses the trial court's invalidation of Commerce's determination that the Reembolso taxes were added to or included in the price of home market silicon metal.

COSTS

Each party shall bear its own costs.

REVERSED

MARUBENI AMERICA CORP., PLAINTIFF-APPELLEE *v.* UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 93–1467

(Decided September 7, 1994)

Gail T. Cumins, Sharretts, Paley, Carter & Blauvelt, P.C., of New York, New York, argued for plaintiff-appellee. With her on the brief were *Ned H. Marshak* and *Peter Jay Baskin*.

Saul Davis, Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, *David H. Cohen*, Director, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, *Carla Garcia-Benitez* and *Edith Sanchez Shea*, Attorneys. Also on the brief was *Karen P. Binder*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel.

Wesley K. Caine and *C. Dean McGrath. Jr.*, Stewart & Stewart, of Washington, DC, were on the brief for Amicus Curiae, American Automobile Manufacturers Association, Inc.

John B. Rehm and *Munford Page Hall, II*, Dorsey & Whitney, of Washington, DC, were on the brief for Amicus Curiae, Association of International Automobile Manufacturers and *Walter S. Huizenga*, of Alexandria, Virginia, was on the brief for Amicus Curiae, American International Automobile Dealers Association.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

Before RICH, NEWMAN, and MAYER, *Circuit Judges*.

RICH, *Circuit Judge*.

The United States (the government) appeals the May 14, 1993, judgment of the Court of International Trade (CIT), No. 90–04–00210, holding that 1989 and 1990, two door, two-wheel and four-wheel drive, Nissan[1] Pathfinder (Pathfinder) vehicles are correctly classified under heading 8703.23.00 (8703) of the Harmonized Tariff Schedule of the United States (HTSUS) as motor vehicles principally designed for the transport of persons. We affirm.

BACKGROUND

A. *The Merchandise:*

The merchandise at issue is a two door, two-wheel or four-wheel drive, dual-purpose or multipurpose passenger vehicle, generally referred to as a compact sports utility vehicle. The Pathfinder does not have a cargo box or bed like a truck. Instead, its body is one unit that is configured much like an ordinary station wagon in that it has rear seats that fold forward, but not flat, for extra cargo space. These seats, however, are not removable. The spare tire is housed within the cargo space or alternatively, it may be attached outside the vehicle on the rear hatch. The rear hatch operates like those on a station wagon; it has a window that may be opened to place small packages in the cargo area without opening the tailgate. The Pathfinder is mechanically designed for both on- and off-road use.

[1] Marubeni America Corp. is the importer of record for the subject merchandise. Nissan Motor Corporation U.S.A. is the real party in interest and is so treated throughout this opinion.

B. *Conversion to the Harmonized System:*

On August 23, 1988, the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418) was enacted. The Act adopted the new tariff nomenclature—the HTSUS, which became effective on January 1, 1989. The new nomenclature system developed as follows. The Trade Act of 1974 mandated that the United States participate in the development of an international product nomenclature known as the Harmonized System. The Harmonized System is a detailed product classification system developed through the Customs Co-Operation Council (CCC). The System provides a common core language for trade; it does not, however, carry any obligations with respect to tariff rates. To facilitate the conversion from the then existing Tariff Schedules of the United States (TSUS) to the HTSUS, a draft conversion was prepared by the International Trade Commission (ITC). The conversion report cross-references items under the TSUS with the HTSUS and vice versa. USITC Pub. 2030 (1983). This draft conversion was reviewed by government agencies, the private sector, and the trading partners. Later that year, the conversion document was republished for private sector review.

There are no HTSUS headings that expressly include vehicles for transport of goods and persons as did 692.10 TSUS. The final cross-referencing report, however, paired 692.10 TSUS, "motor vehicles for the transport of goods and persons," with 8703 HTSUS, "motor vehicles principally designed for the transport of persons;" and 692.02, "automotive trucks," with 8704 HTSUS, "motor vehicles for the transport of goods." *See* USITC Pub. 2051 (1988). Note, however, that the TSUS/HTSUS cross-references should not be viewed as a substitute for the traditional classification process. TSUS/HTSUS Cross Reference Clarification, 53 Fed. Reg. 27,447. Prior to January 1, 1989, the effective date of the HTSUS, the Pathfinder was classified under 692.10 TSUS (motor vehicles for the transport of goods and persons), 2.5% *ad valorem*. While not determinative, prior classification of Pathfinders is instructive. H.R.Con. Rep. No. 576, 100th Cong., 2nd Sess. 549–50 (1988). Legislative history also shows that any changes in the rates of duty from the TSUS to the HTSUS are consequential to the process of converting to the new nomenclature. *Id.* at 1581.

B. *Proceedings below:*

The Pathfinder was classified by the United States Customs Service (Customs) under 8704.31.00 (8704) of the HTSUS as a "motor vehicle for the transport of goods." Pursuant to 9903.87.00 of the HTSUS, a 25% *ad valorem* duty was assessed.

Nissan administratively protested this decision, pursuant to 19 U.S.C. § 1514, claiming that the Pathfinder should be classified as "motor cars and other motor vehicles principally designed for the transport of persons * * * including station wagons" under 8703 HTSUS. This protest was denied. Nissan then brought an action in the CIT. The CIT conducted a three week trial *de novo*, pursuant to 29 U.S.C. § 2640, that

included test driving the Pathfinder and comparison vehicles, videotape viewing, and extensive presentation of both testimonial and documentary evidence. The government argued that the Pathfinder is more like a pick-up truck; therefore, it was a "motor vehicle for the transport of goods." The CIT concluded that Customs' classification of the Pathfinder under 8704 HTSUS, "motor vehicle for the transport of goods," was incorrect, and that the correct classification was under 8703 HTSUS, "motor vehicle principally designed for the transport of persons." The duty assessed under 8703 HTSUS is 2.5% *ad valorem*. The United States now appeals from the judgment of the CIT. We have jurisdiction under 28 U.S.C. §§ 1295(a)(5) (1988)

II

ANALYSIS

The issue is whether the Pathfinder has been classified under the appropriate tariff provision. Resolution of that issue entails a two step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed. The first step is a question of law which we review *de novo* and the second is a question of fact which we review for clear error. *Stewart Warner Corp. v. United States*, 748 F.2d 663, 664–65, 3 Fed. Cir. (T) 20, 22 (Fed. Cir. 1984).

The government asserts that the CIT erred by applying improper and inconsistent standards, and that the Pathfinder is not primarily designed for the transport of persons based on the practice of Nissan and the industry.

A. *Proper meaning:*

It is well settled that " [t]he ultimate issue, whether particular merchandise has been classified under an appropriate tariff provision, necessarily depends on the meaning of the terms of that provision, which is a question of law subject to *de novo* review." *Lynteq, Inc., v. United States*, 976 F.2d 693, 696 (Fed. Cir. 1992). To determine the proper meaning of tariff terms as contained in the statute, the terms are "construed in accordance with their common and popular meaning, in the absence of contrary legislative intent." *E.M. Chemicals v. United States*, 920 F.2d 910, 913 (Fed. Cir. 1990). "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789, 6 Fed. Cir. (T) 121, 125 (Fed. Cir.) *cert. denied*, 488 U.S. 943, 109 S.Ct. 369, 102 L.Ed 358 (1988).

The two competing provisions of the HTSUS are set forth below.

8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars.
8704	Motor vehicles for the transport of goods.

There are no legally binding notes to these headings that are relevant to the classification of dual-purpose vehicles such as the Pathfinder; therefore, we need only look to the common meaning of the terms as they appear above.

By the express language of 8703, "motor vehicle principally designed for the transport of persons," it is clear that the vehicle must be designed "more" for the transport of persons than goods. *Webster's Third New International Dictionary of the English Language,* Unabridged (1986) defines "principally" as "in the chief place, chiefly;" and defines "designed" as "done by design or purposefully opposed to accidental or inadvertent; intended, planned." Thus, if the vehicle is equally designed for the transport of goods and persons, it would not be properly classified under 8703 HTSUS. There is nothing in the legislative history that indicates a different meaning.

The government argues that "the correct standard to be utilized in determining the principal design of any vehicle must be its construction—its basic structure, body, components, and vehicle layout—and the proper question to be asked is whether that construction is uniquely for passenger transportation." This standard is clearly at odds with Customs' interpretation in its March 1, 1989, memorandum providing guidance in applying these headings to sports utility vehicles. Customs stated:[2]

> *Design features,* whether they accommodate passenger transport or cargo transport, or both, *are of two types both of which are relevant in determining the proper classification of a sports-utility vehicle.* First are what may be regarded as *structural, or integral design features* such as basic body, chassis, and suspension design, * * * style and structure of the body [control access to rear). The second type of design features, auxiliary design features are also relevant when determining whether, on the whole, the transport of persons was the principal design consideration. *Neither type by itself can be considered determinative on the issue of the purpose for which the vehicle was principally designed.* (emphasis added)

Thus, "requir[ing] that the resulting product be uniquely constructed for the purpose of transporting persons," to the exclusion of any other use, is a constrictive interpretation of the terms with which we cannot agree.

There is nothing in the statute, legislative history, or prior Customs decisions that would indicate that "principally designed" refers only to a vehicle's structural design as asserted by the government. To answer the question, whether a vehicle is principally designed for a particular purpose, not uniquely designed for a particular purpose, one must look at both the structural and auxiliary design features, as neither by itself is determinative.

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[2] Additionally, Customs' March 1, 1989 memorandum, while instructive, was not based on a thorough factual dissection of the Pathfinder as that before the CIT. Rather, it is a general memorandum providing *guidance* for interpreting the relevant headings relating to sports utility vehicles and vans. Albeit instructive, this document is not determinative.

The government's exclusionary construction fails on another point. Heading 8703 HTSUS specifically includes "station wagons," which are not uniquely designed for transport of persons, rather, they are designed as dual-purpose vehicles for the transport of goods and persons. The Pathfinder, like a station wagon, is a vehicle designed with a dual-purpose—to transport goods and persons.

The specific mention of "including station wagons" in 8703 can affect proper classification when dual-purpose vehicles are at issue. The Explanatory Notes define "station wagon" as "vehicles with a maximum seating capacity of nine persons (including the driver), the interior of which may be used, without structural alteration, for the transport of both persons and goods." Customs Co-operation Council (CCC), 4 Harmonized Commodity Description and Coding System, Explanatory Notes, Heading No. 87.03 (1st. ed. 1987). As noted by the CIT, the Pathfinder meets the literal definition of a station wagon. Even so, the CIT accorded proper weight to the definition offered by the CCC when it stated that the "Explanatory Note definition of station wagons should not be read too literally.[3] As above, we can look to Customs interpretations for instruction on the intended meaning of "including station wagons." Again in its March 1, 1989, memorandum Customs stated:

> [G]iven the wording of the heading and corroborating indications in the working papers of the Customs Cooperation Council, the correct reading appears to be that the phrase 'including station wagons' was not intended to expand upon or be an exception to the requirement that articles are classifiable in heading 8703 only if they are 'principally designed for transport of persons.' It should be emphasized that this interpretation does not read the station wagon reference out of the statute; *its inclusion is necessary to clarify that the cargo-carrying capacity of dual-purpose vehicles does not foreclose a finding that they are principally designed to carry persons.* (emphasis added)

Therefore, notwithstanding the fact that a vehicle may fit the definition of a station wagon and that the term is expressly included in 8703 HTSUS, that vehicle is not automatically included in or excluded from 8703 HTSUS classification. It necessarily follows that correct interpretation of 8703 HTSUS requires a determination of whether or not the vehicle was "principally designed for the transport of persons," and not merely a finding that it is within the definition of a "station wagon," unless of course it is unquestionably a station wagon. The Pathfinder is not the latter.

In summary, we find that the proper meaning of "motor vehicle principally designed for the transport of persons" to be just that, a motor vehicle principally designed for the transport of persons. While we find it unnecessary to assign a quantitative value to "principally," the statutory language is clear that a vehicle's intended purpose of transporting

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[3] Explanatory Notes are only instructive and are not d-spositive or binding. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), renrinted in 1988 U.S.C.C.A.N. 1547, 1582).

persons must outweigh an intended purpose of transporting goods. To make this determination, we find that both the structural and auxiliary design features must be considered. This construction comports with Customs' interpretations and the CIT's analysis; and it is equally consistent with the common and popular meaning of the terms.

B. *Proper classification:*

While the meaning of a classification term is a question of law, the issue of whether merchandise comes within the definition of a classification term is a question of fact subject to the clearly erroneous standard of review. *Simod America Corp. v. United States,* 872 F.2d 1572, 1576, 7 Fed. Cir. (T) 82, 86 (Fed. Cir. 1989). Customs' classification of imported merchandise is presumed to be correct, 28 USC § 2639(a)(1) (1988), and the party challenging the classification has the burden of overcoming this presumption. *Id.* To overcome this presumption, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v United States,* 733 F.2d 73, 878, 2 Fed. Cir. (T) 70, 75 (Fed. Cir. 1984). "Whether the court remands, conducts its own hearing, or simply examines the law and the tariff schedules on its own initiative, it is required to reach a *correct* result." *Id.* "[T]he court's duty is to find the *correct* result * * *." *Id.* (emphasis in original).

If the Pathfinder satisfies the requirements of 8703 HTSUS, there is no need to discuss 8704 HTSUS because under the General Rules of Interpretation (GRI) when an article satisfies the requirement of two provisions, it will be classified under the heading giving a more specific description, here 8703 HTSUS. GRI 3(a). Conversely, if the Pathfinder does not fall within 8703 HTSUS, it falls into 8704 HTSUS.

The CIT conducted a three week trial *de novo*, pursuant to 28 U.S.C. § 2640, to determine whether the Pathfinder was principally designed for the transport of persons or goods. The CIT looked at both design intent and execution, evaluating both structural and auxiliary design features. The CIT limited evidence to the vehicle models in the entries currently under consideration with the exception of evidence that was provided for comparison with vehicles that were readily accepted as trucks or passenger cars. These included the Nissan Hardbody truck and the Nissan Maxima sedan.[4]

It is evident that the CIT carefully applied the proper standards in making its decision. In reaching its conclusion, the CIT evaluated the marketing and engineering design goals (consumer demands, off the line parts availability, etc.), the structural design necessary to meet both cargo and passenger carrying requirements for both on- and off-road use, as well as interior passenger amenities.

The CIT also recognized that the Pathfinder was basically derived from Nissan's Hardbody truck line yet, the Pathfinder was based upon

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[4] The CIT noted that there was not a Nissan station wagon available for comparison and consequently saw little use in comparing the Pathfinder to a sedan.

totally different design concepts than a truck. The CIT correctly pointed out these differences and more importantly, the reasons behind the design decisions, including the need for speed and economy in manufacturing to capture the changing market, a market into which Nissan was a late entrant. Specifically, the designers decided to adopt the Hardbody's frame side rails and the cab portion from the front bumper to the frame just behind the driver's seats so that they could quickly and economically reach the market. The front suspension system was also adopted from Nissan's truck line but the rear suspension was not. The fact that a vehicle is derived in-part from a truck or from a sedan is not, without more, determinative of its intended principal design objectives which were passenger transport and off-road capability.

Substantial structural changes were necessary to meet the design criterion of transporting passengers. The addition of the rear passenger seat required that the gas tank be moved to the rear and the spare tire relocated. This effectively reduces the cargo carrying capacity of particular importance was the design of a new rear suspension that was developed specifically to provide a smooth ride for passengers. New and different cross beams, not present on the Hardbody frame, were added to the Pathfinder's frame to accommodate the above changes.

Other design aspects that point to a principal design for passengers include: the spare tire and the rear seat when folded down intrude upon the cargo space; the cargo area is carpeted; a separate window opening in the pop-up tailgate accommodates passengers loading and unloading small packages without having to lower the tailgate. In contrast, the Hardbody truck bed can accommodate loading with a fork lift, clearly a design feature for cargo. The CIT also found that the cargo volume is greatly reduced when the rear seat is up to accommodate passengers Moreover, the axle and wheel differences are minor and consistent with the Pathfinder's off-road mission particularly in the loaded condition.[5] The Path finder has the same engine size as the Maxima passenger car

Auxiliary design aspects, in addition to those merely relating to the structural derivation of the Pathfinder, that indicate passenger use over cargo use include: vehicle height was lowered 50 millimeters; the seat slides were improved yet similar to those on two door passenger sedans. Other auxiliary design features that point to transport of passengers Include: rear seats that recline, are comfortable, and fold to make a fairly flat cargo bed but are not removable; rear seat stereo outlets, ashtrays, cubbyholes, arm rests, handholds, footwells, seat belts, child seat tie down hooks and operable windows. The CIT noted that there is not much more that can be done to accommodate passengers in the rear seat. Moreover, the testimony of the three primary design engineers as

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[5] In its March 1, 1989, memorandum Customs stated: **[Bl. Br. B–7]**

> * * * [T]he heading 8703 does not exclude multi-purpose vehicles solely because they have been designed to meet the rigorous requirements of cargo transport. It would be insufficient to consider only those design features that enable a vehicle to carry loads that are large or heavy relative to vehicle size. Other design features are also relevant because they enable a given vehicle to carry passengers, they enhance its suitability for that purpose, and they may, in some cases, reveal the purpose for which the vehicle was principally designed. March 1, 1989 memorandum.

well as the contemporaneous design development documents support the finding that the Pathfinder was principally designed for the transport of persons.

The non-tariff regulations (NHTSA and EPA regulations) are not dispositive for purposes of tariff classification. *See International Spring Mfg. v. United States,* 85 Cust. Ct. 5, 8, C.D. 4862, 496 F. Supp. 279, 282 (1980), *aff'd* 68 CCPA 13, C.A.D. 1257, 641 F.2d 875 (1981). The government concedes this point. Nonetheless, the government goes on to argue that "the fact that safety, emission and fuel design changes required by those regulations are an element of the design process * * * should afford greater import to Nissan's decisions of what features to incorporate under the * * * regulatory schemes" and that these regulations are in accord with the motor vehicle industry. As noted by the CIT, the government's assessment that these regulatory schemes contain language that is substantially the same as the statutory language in the HTSUS, therefore affording these regulations greater relevance, is misplaced. The reasoning is baseless because those regulations include a category for Multipurpose Passenger Vehicles (MPV), a category that is not specifically delineated in the HTSUS.

In its March 1, 1989, memorandum referred to above, Customs has drawn what appears to be a line between two door and four door versions of sports utility vehicles. Customs conclusion, however, that vehicles that lack rear side passenger access doors are to be classified under 8704, is *de facto* affording determinative weight to this feature This line, classifying two door dual-purpose vehicles for the transport of goods while classifying the four door version as principally designed for transport of persons appears to be arbitrary

Passenger cars with two doors also have restricted entry into the rear seat but this fact does not take these vehicles out of 8700 classification. Two door passenger cars are equipped with a seat slide mechanism that effectively slides the front seat forward to provide easier access to the rear seat. The doors of two door passenger cars are generally wider as well. The CIT found that the Pathfinder has both of these features so that passengers can be easily accommodated. Therefore, the two door Pathfinder accommodates passengers in the rear seat as well as two door passenger cars, if not as easily as four door sports utility vehicles. Consequently, the number of doors on a vehicle should not be determinative

CONCLUSION

We hold that the court applied the correct legal standards, and that the evidence of record supports the CIT's decision that the Pathfinder is principally designed for the transport of persons.

Accordingly, we affirm the decision of the Court of International Trade in holding that the Pathfinder vehicle at issue is correctly classified under 8703.23.00 of the Harmonized Treaty System (US)

AFFIRMED

NORTH AMERICAN PHILIPS CORP. AND LOCKHEED SANDERS, INC., PLAINTIFFS-APPELLANTS *v.* AMERICAN VENDING SALES, INC., ATLAS DISTRIBUTING, INC., CAPCOM U.S.A. INC., COIN MACHINE CORP. OF AMERICA, DATA EAST U.S.A., INC., KONAMI (AMERICA) INC., LELAND CORP., ROMSTAR INC., SNK CORP. OF AMERICA, TEMCO, INC., TRADEWEST INC., AND WORLD WIDE DISTRIBUTORS INC., DEFENDANTS-APPELLEES, AND TAITO AMERICA CORP., DEFENDANT

Appeal No. 94–1146

(Decided September 22, 1994)

Theodore W. Anderson, Leydig, Voit & Mayer, Ltd., of Chicago, Illinois, argued for plaintiffs-appellants. With him on the brief were *Steven P. Petersen* and *Wesley O. Mueller.*

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Appealed from: U.S. District Court for the Northern District of\ Illinois

Judge LEINENWEBER

Before MAYER, CLEVENGER, and SCHALL, *Circuit Judges.*

CLEVENGER, *Circuit Judge.*

North American Philips Corporation and lockheed Sanders, Inc., appeal the December 13, 1993, final judgment of the United States District Court of the Northern District of Illinois dismissing their complaint against The Leland Corporation and Tradewest Inc. pursuant to Federal Rule of Civil Procedure 12(b)(2) for want of jurisdiction. *North Am. Philips Corp. v. American Vending Sales Inc.*, 29 USPQ2d 1817 (N.D Ill. 1993) (Memorandum Opinion and Order). We reverse and remand for further proceedings.

I

This case involves the alleged infringement of a patent in the arcade video game art. North American Philips and Lockheed filed a complaint on June 1, 1993 against Leland, Tradewest and eleven other defendants. On September 1, 1993, Leland and Tradewest moved to dismiss on

venue and personal jurisdiction grounds.[1] They attached affidavits of the presidents of their respective corporations, Messrs. Rowe and Cook. Though admitting they had made sales "of products shipped to customers in Illinois," they characterized these sales in conclusory terms as "modest" and "negligible."

After allowing plaintiffs limited discovery on the jurisdictional question, the district court issued its ruling based on the following jurisdictional facts: Leland is incorporated in California and has its principal place of business in that state; Tradewest is incorporated in Texas and has its principal place of business in that state. Neither has an office, P.O. box, agents, employees, assets, or property in Illinois. Between 1987 and 1989, these two defendant manufacturers entered into contracts to sell video games with two distributors based in Illinois. Leland and Tradewest then had ongoing business relationships with their Illinois customers, including visits to Illinois by officers of Leland and Tradewest to promote sales of their products to those customers Leland and Tradewest also participated in trade shows in Illinois to promote sales of their products. All the goods destined for Illinois were delivered "free on board" (f.o.b.)[2] in Texas and California. Since 1991, Leland has had no contacts with Illinois.

The district court noted that the *in personam* jurisdictional reach of a federal district court in a patent case is coextensive with the *in personam* jurisdictional reach of the courts of the state in which the district court sits and thus turned to Illinois law. It then analyzed the facts under several jurisdictional heads, common law and statutory law. Since plaintiffs concede that the defendants lack the sort of substantial and continuing contacts that amount to physical presence in the forum and thus give rise to a general jurisdiction under common law principles, we discuss only the court's ruling that it lacked specific jurisdiction under the Illinois long-arm statute.

That statute vests Illinois courts with power over defendants "as to any cause of action arising from" the "transaction of business" in Illinois, the "commission of a tortious act" in Illinois, or any other contacts sufficiently weighty to satisfy constitutional requirements. *See* Ill. Rev. Stat. ch. 110, §§ 5/2–209(a)(1)–(2), (c) (West 1994).

Under the tort provision, the court held that patent infringement is a wrong whose legal situs is where the injury is felt, namely the residence of the patent holder, rather than where the offending act occurs. The plaintiffs are incorporated in Delaware and have their principal places of business in New York and New Hampshire, respectively. Therefore, reasoned the court, the tortious act alleged was not committed in Illinois.

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[1] The venue issue is subsumed in the personal jurisdiction issue. Venue lies ipso facto if we hold, as we do, that the district court has personal jurisdiction over Leland and Tradewest. See VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 16 USPQ2d 1614 (Fed. Cir. 1990).

[2] "Free on board" is a method of shipment whereby goods are delivered at a designated location, usually a transportation depot, where legal title and thus the risk of loss passes from seller to buyer. *See* Black's Law Dictionary 642 (6th ed. 1990); U.C.C. § 2–319(1).

Under the transacting business provision, the court held that since the suit was not upon the contracts pursuant to which the allegedly infringing products had been sold, the cause of action arose not out of the transactions between the parties to the contracts, but instead collaterally out of the tortious occurrence of alleged infringement against the third party plaintiffs. Even if defendants were wrong about the situs and the transactions must therefore be deemed to have occurred within the forum for purposes of a contacts analysis, jurisdiction still would not have attached under the transacting business provision. The court thus seemed to be construing the two provisions as creating two distinct categories, tort and contract, and to be concluding that this case sounds strictly in tort, which tort did not occur in Illinois.

Finally under the part of the Illinois long-arm statute that extends jurisdiction to the limits of the federal and Illinois constitutions, the district court reiterated its conclusion that since the action did not arise out of any tortious acts of infringement in Illinois or any transactions of business by plaintiffs with Leland and Tradewest in Illinois, the district court had no jurisdiction over Leland and Tradewest. Absent *in personam* jurisdiction over Leland and Tradewest, the district court also found venue wanting.

II

A district court's ultimate conclusion as to whether it has jurisdiction, and any subsidiary conclusions regarding the legal effect of particular jurisdictional facts, present questions of law subject to review *de novo*. *See e.g., Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir 1986).

In concluding that the situs of the putative "tort" of patent infringement is the domicile of the patentee, the district court relied on its reading of *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1142, 184 USPQ 387, 390–91 (7th Cir. 1975). Unfortunately, the district court did not have the benefit of this court's subsequent opinion in *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1570–71, 30 USPQ2d 1001, 1011–12 (Fed. Cir. 1994), which disagreed that *Honeywell* stood for that proposition and instead held as a matter of uniform federal patent law that patent infringement occurs where allegedly infringing sales are made. *Id.* at 1570–71, 30 USPQ2d at 1011–12. In addition, while it may be appropriate to speak loosely of patent infringement as a tort, more accurately the cause of action for patent infringement is created and defined by statute. *See* 35 U.S.C. § 271(a) (1988). The statute does not speak generally of the "tort of patent infringement," but specifically of a liability that arises upon the making, using, or selling of an infringing article. Thus, the statute on its face clearly suggests the conception that the "tort" of patent infringement occurs where the offending act is committed and not where the injury is felt. *Id.*

Our conclusion that the situs of the infringement is wherever an offending act is committed, however, does not end the inquiry in this case under the tort provision of the Illinois long-arm statute. We still

must determine whether the "tortious act[s]" upon which this suit is based were "commi[tted]" in Illinois. We thus address the legal question, which the district court did not reach, of what relevance the delivery of the allegedly infringing articles f.o.b. in Texas and California has on the legal situs, for purposes of the tort provision of the Illinois long-arm statute, of the allegedly tortious sales at issue here.

We emphasize at the outset that we are deciding this point upon which the appeal turns purely as a matter of federal law. Our holding is therefore limited. The tort alleged in this case exists solely by virtue of federal statute, and defining its contours inevitably entails the construction of that statute—not the Illinois long-arm statute. The latter simply creates a general, procedural rule that torts committed in Illinois give rise to jurisdiction over potential defendants. It is not the source of the substantive right and does not purport to affect its scope or nature. So, while the federal choice of law rule concerning personal jurisdiction requires us to look to state law in the first instance, the character of the particular tort alleged here requires a look back to federal law on the conceptualization of the tort and its situs

The difficulty in answering this question is that unlike the "making" and the "using" of an infringing article, which as purely physical occurrences are relatively straightforward to place, the "selling" of an infringing article has both a physical and a conceptual dimension to it. That is to say, it is possible to define the situs of the tort of infringement-by-sale either in real terms as including the location of the seller and the buyer and perhaps the points along the shipment route in between, or in formal terms as the single point at which some legally operative act took place, such as the place where the sales transaction would be deemed to have occurred as a matter of commercial law. Appellees suggest that this point is where the goods change hands, which in this case of course fell outside Illinois.

We hold that to sell an infringing article to a buyer in Illinois is to commit a tort there (though not necessarily only there). To hold otherwise would exalt form over substance in an area where the Supreme Court generally has cautioned against such an approach. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 478–79 (1985) ("The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests, or on 'conceptualistic * * * theories * * *.' Instead, we have emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations *with future consequences [that] are the real object of the * * * transaction.'")* (emphasis added; citations omitted); *see, e.g., Wilden Pump & Eng'g Co. v. Versa-Matic Tool Inc.,* 20 USPQ2d 1788, 1790–91 (C.D. Cal. 1991) (sales of allegedly infringing articles to distributors in the forum could not be said to fall entirely without the forum for purposes of a jurisdictional analysis simply because they were delivered f.o.b. outside the forum).

Furthermore, even if we were to conclude that a "mechanical' test" might be appropriate here for some reason, appellee has failed to explain why the criterion should be the place where legal title passes rather than the more familiar places of contracting and performance. *See Burger King,* 471 U.S. at 478 (citing *International Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945)). Appellees have pointed to no policy that would be furthered by according controlling significance to the passage of legal title here This case has nothing to do, for example, with the proper allocation of the risk of loss between parties to the underlying sales contracts.

III

Having disposed of this appeal under the tort provision on a narrow ground of federal law, we need not, and therefore will not, venture an opinion on whether the Illinois legislature intended the tort and "transacting business" provisions to be mutually exclusive, or even if they overlap to some extent, whether the effect of f.o.b. delivery on the legal situs of a sale might be different under the latter provision. We are still obliged to determine, however, whether exercising power under the tort provision of the Illinois long-arm statute violates the defendants' constitutional right to due process of law guaranteed by the Fifth and Fourteenth Amendments. Since the catch-all long-arm jurisdictional provision, by its terms, constitutes a plenary grant of power to the limits of constitutionality, we note that we are simultaneously passing on the application of this provision of the Illinois long-arm statute. In other words, to approve the dismissal of plaintiff's complaint, we must conclude that it would be unconstitutional for an Illinois court to subject these defendants to *in personam* jurisdiction under *International Shoe* and its progeny.

As a threshold matter, we note that Illinois clearly has an interest in prohibiting the importation of infringing articles into its territory and regulating the conduct of the distributors with respect to the subsequent resales, *see Beverly Hills Fan,* 21 F.3d at 1568, 30 USPQ2d at 1009 (citing *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 776 (1984)). To suppose that a state must have a pecuniary interest in a matter, perhaps absent here because neither plaintiffs nor defendants are domiciliaries of Illinois, is to mistake a necessary for a sufficient condition for the assertion of personal jurisdiction. We doubt that the residual power of the several states, guaranteed by the Tenth Amendment, is so impoverished that it could not reach parties who dispatched allegedly infringing goods into their respective territories so long as the limitation imposed by the Due Process Clause is not transgressed. To that limitation we now turn.

In *International Shoe,* the Supreme Court held that "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

326 U.S. at 316. Subsequent cases have emphasized the importance of the quality as opposed to the quantity of contacts, examining whether the contacts resulted from the "purposeful" activity of the defendant, *see, e.g., Keeton v. Hustler Magazine*, 465 U.S. at 774, as opposed to, for example, the unilateral activity of a third-party over which defendant had little or no control, *see, e.g., Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

In this case, Leland and Tradewest voluntarily placed a substantial quantity of infringing articles into the stream of commerce conscious that they were destined for Illinois. Regardless where the transactions are deemed to be situated under the tort or the "transacting business" provisions, these defendants were nonetheless parties to the importation into the forum state. Surely the reasonable market participant in the modern commercial world has to expect to be haled into the courts of that state, however distant, to answer for any liability based at least in part on that importation. *See Beverly Hills Fan*, 21 F.3d at 1566, 30 USPQ2d at 1008 (finding personal jurisdiction on substantially similar facts); *see also Novacolor, Inc. v. American Film Technologies, Inc.*, No. 91 C 6213, 1992 WL 170564, at 4–5 (N.D. Ill. July 16, 1992) (unpublished) (same). Furthermore, since the importers were distributors, Leland and Tradewest also knew or reasonably could foresee that the articles would be resold in Illinois, whereupon a distinct liability for contributory infringement would arise in them. This makes the possibility of being summoned for judgment in Illinois all the more foreseeable.

In addition to directing the goods toward Illinois, these defendants also "purposefully avail[ed]" themselves of the protections and privileges of Illinois law insofar as the demand that gave rise to the transactions existed in part thanks to the legal and economic infrastructure supporting and protecting the buyer corporations. *See, e.g., Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This further strengthens our conclusion that the United States District Court for the Northern District of Illinois has jurisdictional power over these defendants in this action

For these reasons, the judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED

TEXAS CRUSHED STONE CO., PARKER LAFARGE, INC., AND GULF COAST LIMESTONE INC., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE, AND VULCAN MATERIALS CO., CALIZAS INDUSTRIALES DEL CARMEN, S.A., AND VULCAN/ICA DISTRIBUTION CO., DEFENDANTS-APPELLEES

Appeal No. 93–1481

(Decided September 15, 1994)

Eugene L. Stewart, Stewart & Stewart, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *Terence P. Stewart, James R. Cannon, Jr.* and *Lane S. Hurewitz.*

Shara L. Aranoff, Attorney, U.S. International Trade Commission, Office of the General Counsel, Washington, DC, argued for defendant-appellee. With her on the brief were *Lyn M. Schlitt,* General Counsel and *Judity M. Czako,* Acting Assistant General Counsel. *O. Thomas Johnson, Jr.,* Covington & Burling, of Washington, DC, argued for defendants-appellees. With him on the brief were *Harvey M. Applebaum, David R. Grace* and *Thomas O. Barnett.*

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

Before CLEVENGER, *Circuit Judge,* SKELTON, *Senior Circuit Judge,* and SCHALL, *Circuit Judge.*

SCHALL, *Circuit Judge.*

Appellants, Texas Crushed Stone Company, Parker Lafarge, Inc. and Gulf Coast Limestone, Inc., appeal from the May 25, 1993 judgment of the United States Court of International Trade (CIT), sustaining a negative preliminary determination of the United States International Trade Commission (ITC or agency) under sections 773(a) and 771(4)(C) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1673b(a) 1677(4)(C) (1988). *Texas Crushed Stone Co. v. United States,* 822 F. Supp. 773 (Ct. Int'l Trade 1993). The ITC determined that there was not a concentration of dumped imports of crushed limestone from Mexico into a regional market comprised of 75 counties in Southeast Texas. We affirm.

BACKGROUND

I. *The Statutory Scheme:*

One of the purposes of the antidumping statute is to remedy the harm caused by sales of imported merchandise in the United States at less than fair value (LTFV). consequently, if imported merchandise is being sold, or is likely to be sold, at LTFV and as a result, an industry in the United States is materially injured or threatened with material injury, the statute authorizes the imposition of an antidumping duty on such merchandise. 19 U.S.C. § 1673 (1988).

Antidumping proceedings are normally commenced when interested parties file petitions with the ITC and the International Trade Adminis-

tration (ITA). 19 U.S.C. § 1673a(b) (1988).[1] Such proceedings involve five stages: (1) Within 20 days of the filing of a petition, the ITA decides whether to initiate an investigation. 19 U.S.C. § 1673a(c). An investigation is initiated if the petition alleges the elements necessary for the imposition of a duty and contains information reasonably available to the petitioner supporting the allegations. 19 U.S.C. § 673a(c)(1) If the ITA finds the petition insufficient, an investigation is not initiated, 19 U.S.C. § 1673a(c)(3), and any investigation initiated by the ITC is terminated. 19 U.S.C. § 1673b(a) (1988).[2] (2) If the ITA does not find the petition insufficient, the ITC must preliminarily determine, within 45 days of the petition filing date, whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury. 19 U.S.C. § 1673b(a). If that determination is negative, the investigation is terminated. 19 U.S.C. § 1673b(a). (3) If the ITC finds a reasonable indication of material injury or threat of material injury, the ITA must preliminarily determine, within 160 days of the petition filing date (subject to an extension), whether there is a reasonable basis to believe or suspect that merchandise is being sold, or is likely to be sold, at LTFV 19 U.S.C. § 1673b(b)(1). An affirmative preliminary LTFV determination by the ITA results in the suspension of liquidation of duties and the posting of bonds for the merchandise 19 U.S.C. § 1673b(d)(1)–(2). A negative preliminary LTFV determination prevents imposition of those provisional remedies but does not terminate the investigation. (4) Within 75 days of its preliminary determination (subject to an extension), the ITA makes a final determination with respect to the sale of merchandise at LTFV. 19 U.S.C. § 1673d(a)(1) (1988). If that final determination is negative, the investigation is terminated. 19 U.S.C. § 1673d(c)(2). (5) If the ITA's final LTFV determination is affirmative, the ITC makes a final determination of material injury. 19 U.S.C. § 1673d(b)(1).[3] If the ITC determines that no injury exists, the investigation is terminated. If the ITC determines that injury exists, the ITA issues an antidumping duty order 19 U.S.C. § 1673d(c)(2). *See generally American Lamb Co. v. United States,* 785 F.2d 994, 998–99 (Fed. Cir 1986). In this case, the antidumping proceedings were terminated after the ITC made a stage (2) negative preliminary determination.

II. *Proceedings Before the ITC:*

On May 20, 1992, appellants filed petitions with the ITC and the ITA alleging that an industry in the United States was materially injured or threatened with material injury by reason of imports of crushed lime-

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[1] The ITC and ITA are "charged" with administering different parts of the antidumping statute. *See Suramerica de Aleaciones Laminadas, C.A. v. United States,* 966 F.2d 660, 665 n.6 (Fed. Cir. 1992). The ITC is an independent agency, while the ITA is part of the United States Department of Commerce.

[2] The ITC may have already initiated an investigation, because within 45 days of the petition filing date the ITC must make a preliminary determination. 19 U.S.C. § 1673b(a).

[3] If the ITA's preliminary determination is affirmative, the ITC's final determination must be made within 120 days of that preliminary determination or within 45 days of the ITA's final determination, whichever is later. 19 U.S.C. § 1673d(b)(2). If the ITA's preliminary determination is negative, the ITC's final determination must be made within 75 days of any affirmative final determination by the ITA. 19 U.S.C. § 1673d(b)(3).

stone from Mexico at LTFV. *Texas Crushed Stone,* 822 F. Supp. at 774,[4] In due course, the ITC conducted a stage (2) preliminary investigation under 19 U.S.C. § 1673b(a) to determine whether there was a reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of the subject imports. *Id.* In such an investigation, when defining "industry," the ITC may conduct a regional industry analysis as provided in the statute:

> In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if—
>
> (i) the producers within such market sell all or almost all of their production of the like product in question in that market, and
>
> (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States
>
> In such appropriate circumstances, material injury, the threat of material injury, or material retardation of the establishment of an industry may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a like product constitutes a major proportion of the total domestic production of that product, is not injured, if there is a concentration of subsidized or dumped imports into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury, or if the establishment of an industry is being materially retarded, by reason of the subsidized or dumped imports.

19 U.S.C. § 1677(4)(C) (1988). The regional industry provision was expressly added to the antidumping statute as part of the Trade Agreements Act of 1979. *See* Trade Agreements Act of 1979, Pub. L. No. 96–39, § 771(4)(C), 93 Stat. 144, 177; *see also supra* note 6. In its preliminary investigation, the ITC conducted a regional industry analysis. In so doing, it adopted the region of 75 counties in Southeast Texas (the Southeast Texas Region or region) proposed by appellants, who asked that the case be considered on a regional industry basis. *Texas Crushed Stone,* 822 F. Supp. at 774.

Based on the information obtained during the investigation, the ITC made a negative preliminary determination. *Id.* The ITC determined that there was not a concentration of dumped imports into the Southeast Texas Region. *Id.* The ITC stated that "[w]hile the statute does not define concentration, the [ITC] generally has found concentration of dumped imports at or above 80 percent of total imports into the United

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[4] All of the Mexican crushed limestone at issue in this case came from the Yucatan Peninsula quarry of appellee Calizas Industriales del Carmen, S.A. (Calica), and was imported into the United States by appellee Vulcan/ICA Distribution Company (Vulcan/ICA). *Id.* Appellee Vulcan Materials Company, a domestic operator of limestone quarries throughout the United States, owns interests in Calica and Vulcan/ICA through one of its wholly owned subsidiaries. *Id.* Vulcan/ICA began to import crushed limestone into the United States for use as construction aggregate in 1990. *Id.*

States to meet the statutory criterion." *Id.* at 775. The ITC noted that in 1990, 55.1 percent of imports of crushed limestone from Mexico were imported into the region; in 1991, 59.6 percent; and in the period from January through March 1992, 54.3 percent. *Id.* The ITC concluded that these levels of imports did not satisfy the statutory concentration requirement. *Id.* Because import concentration was not satisfied for the Southeast Texas Region, the ITC did not reach the stage (2) issue of material injury or threat of material injury. *Id.* The ITC stated that a finding of import concentration was a legal prerequisite to an analysis of whether the producers of all or almost all of the production within the market were being materially injured or threatened with material injury. *Id.*

In concluding that the statutory concentration requirement had not been met, the ITC used the "percent of imports" test. Under that test, the ITC considers the percentage of all the dumped imports of a given product (in this case, crushed limestone) that are imported into a particular region. *Id.* at 777. If the region accounts for a sufficiently large percentage of all the dumped imports of that product into the United States in light of the facts of the case, the ITC will find that such imports are concentrated and will proceed to determine whether there is material injury or the threat of material injury. *Id.* Appellants had urged the ITC to use what is referred to as the "ratio of import penetration" test– Under that test, the ITC determines whether there is concentration by considering whether dumped import penetration of a given product (ratio of such imports to consumption) in a particular region is relatively higher in that region than dumped import penetration of that product in the United States as a whole. *Id.*

III. *Proceedings in the CIT:*

Appellants appealed the ITC's negative preliminary determination to the CIT.[5] Before the CIT, appellants contended that the ITC should have used the ratio of import penetration test in analyzing import concentration *Id.* at 775. Appellants argued that the ITC departed from its prior practice by using only the percent of imports test and by applying a higher numerical cut-off under that test. *Id.* Appellants also asserted that the ITC had failed to apply the proper legal standard in making a preliminary determination, in that it allegedly failed to consider the complete record *Id.* Finally, appellants contended that the ITC should have considered evidence on the record which demonstrated a threat of material injury. *Id.*

Appellees contended that the ITC's interpretation of 19 U.S.C. § 1677(4)(C) was reasonable. *Id.* at 776. They argued that the ITC has discretion in choosing its method for determining import concentration and that neither the antidumping statute, the regional industry provision, nor ITC practice binds the agency to a precise numerical cut-off in

[5] Judicial review in the CIT is available of any negative preliminary determination (stages 1–3), 19 U.S.C. § 1516a(a)(1) (1988), and of any final determination (stages 4 and 9) 19 U.S.C. § 1516a(a)(2) (1988).

analyzing import concentration. *Id.* They also argued that the ITC had applied the proper legal standard in making a preliminary determination, in that it considered the complete record in analyzing import concentration and that there was no reason for it to believe that contrary evidence would arise in any final investigation. *Id.* Finally, appellees contended that the ITC was not required to consider evidence of material injury or threat of material injury once it found that there was not a concentration of dumped imports into the Southeast Texas Region. *Id.*

As already noted, the CIT sustained the ITC's ruling. *Id.* at 782. The court concluded that the negative preliminary determination was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* First, the court held that the ITC had reasonably interpreted 19 U.S.C. § 1677(4)(C) as giving it discretion in analyzing regional import concentration and that the ITC was within its discretion in applying the percent of imports test *Id.* at 779. The court reasoned that the language of 19 U.S.C. § 1677(4)(C) does not define import concentration and that the legislative history of 19 U.S.C. § 1677(4)(C) does not require that the ITC use the ratio of import penetration test when analyzing import concentration. *Id.* at 777. As for appellants' contention that the ITC had departed from its prior practice by applying a higher numerical cut-off under the percent of imports test, the court concluded that there was not an established prior practice in this regard and stated that Congress had intended for the ITC to base its determinations on the particular facts of each case. *Id.* at 780. The court also rejected appellants' argument that the ITC had failed to apply the proper legal standard in making a preliminary determination, in that it failed to consider evidence that imports into the region might have increased sufficiently to be considered concentrated by the time of the final determination. *Id.* The court noted that the ITC had based its concentration analysis on a complete record and that there was no reason for the ITC to believe that contrary evidence would arise in a final investigation. *Id.* at 781.

Finally, the court rejected appellants' argument that the ITC should have considered evidence relevant to the issue of material injury or threat of material injury. *Id.* The court stated that 19 U.S.C. § 1677(4)(C) sets forth three prerequisites for an affirmative determination under a regional industry analysis: existence of a regional market; concentration of dumped imports into the regional market; and material injury or threat of material injury to producers of all or almost all of the regional production. *Id.* at 777 Because regional import concentration was not satisfied, the ITC could not proceed to the issue of material injury or threat of material injury. Thus, the CIT concluded, there was no need for the ITC to examine evidence relevant only to that issue. *Id.* at 781–82

DISCUSSION

I. STANDARD OF REVIEW

In reviewing a determination of the ITC, the CIT is governed by the standard of review set forth in 19 U.S.C. § 1516a(b)(1) (1988). Section 1516a(b)(1) provides that the CIT "shall hold unlawful any determination, finding, or conclusion found—(A) * * * to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." We, in turn, review a decision of the CIT by applying for ourselves the statute's standard of review to the ITC's determination. *Trent Tube v. Avesta Sandvik Tube,* 975 F.2d 807, 813 (Fed Cir 1992). Therefore, we must affirm the decision of the CIT in this case, unless we conclude that the ITC's negative preliminary determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In applying this standard, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment * * *. Although [the] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971) (citations omitted).

II. ANALYSIS

A

On appeal, appellants repeat the contentions they made before the CIT. Their principal argument is that the ITC abused its discretion in analyzing "concentration of * * * dumped imports" as set forth in 19 U.S.C. § 1677(4)(C) using the percent of imports test. In resolving this issue, we are guided by the following instructions of the Supreme Court:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute

Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984) (footnotes omitted). By virtue of its responsibilities under the antidumping statute and its expertise, the ITC is entitled to the benefit of *Chevron* deference. *Suramerica,* 966 F.2d at 665 n.5.

Our first task is to examine the pertinent statutory language in order to determine whether Congress has "directly spoken to the precise ques-

tion at issue." *Chevron,* 467 U.S. at 842 Under 19 U.S.C. § 1677(4)(C), material injury or threat of material injury may be found to exist if "there is a concentration of * * * dumped imports" into the regional market. Section 1677(4)(C) does not define "concentration," however, nor does it explain how to determine whether dumped imports are concentrated. Therefore, the plain language of the statute does not provide us with an "unambiguously expressed intent of Congress," *Chevron,* 467 U.S. at 843, with respect to the question of whether, in conducting its concentration inquiry, the ITC was required to use the ratio of import penetration test.

Neither is the legislative history instructive. *See Suramerica,* 966 F.2d at 667 ("neither the statute nor the legislative history gives specific guidance on how Congress wished this issue to be decided"). Appellants point to language from a Senate Report, while appellees rely upon language in a House Report and in the 1979 Statement of Administrative Action.[6] The Senate Report reads as follows: "The requisite concentration *will* be found to exist in at least those cases where the ratio of the subsidized, or less-than-fair-value, imports to consumption of the imports and domestically produced like product is clearly higher in the relevant regional market than in the rest of the U.S market." S. Rep. No. 249, 96th Cong., 1st Sess. 83, *reprinted in* 1979 U.S.C.C.A.N. 381, 469 (emphasis added). The House Report, however, states that "concentration *could* be found to exist if the ratio of such imports to consumption is clearly higher in the regional market than in the rest of the U.S. market." H.R. Rep. No. 317, 96th Cong., 1st Sess. 73 (1979) (emphasis added) The 1979 Statement of Administrative Action also uses permissive, as opposed to mandatory, language: "Concentration of subsidized or dumped imports *could* be found to exist if there is a clearly higher ratio of such imports to consumption in such market than the ratio of such imports to consumption in the remainder of the United States market." H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 388, 432 (1979) (emphasis added).

Clearly, the language from the legislative history does not reveal an expressed intent on the part of Congress that the ratio of import penetration test be used in determining whether there is a concentration of dumped imports in a particular region. The most that can be said is that the legislative history contains conflicting statements on whether concentration of dumped imports must be found when there is a higher ratio of such imports to consumption in the regional market

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[6] In general, differences between the House and Senate over the meaning of provisions in a bill are resolved by a conference committee, which issues a conference report setting forth a resolution of the differences. The Trade Agreements Act of 1979 (which expressly added the regional industry provision to the antidumping statute) was not subject to the usual conference process, however, because it was presented by the President to Congress pursuant to 19 U.S.C. § 2112(d), (e) (1988). 19 U.S.C. § 2112(d) provides that "[w]henever the President enters into a trade agreement under this section * * *, he shall submit such agreement, together with a draft of an implementing bill * * * and a statement of any administrative action proposed to implement such agreement, to the Congress as provided in subsection (e) of this section * * *." The 1979 Statement of Administrative Action was the last in time of the three pertinent legislative history documents to be considered by Congress and was the only one approved by Congress. *See* 19 U.S.C. § 2503(a) (1988) ("Congress approves the trade agreements * * * submitted to the Congress on June 19, 1979, and the statements of administrative action proposed to implement such trade agreements submitted to the Congress on that date.")

than in the rest of the United States market. One source states that, in such a situation, concentration "will be found," while two other sources, one of which was approved by the congress, *see supra* note 6, state that, in such a situation, concentration "could be" found. Under these circumstances and in view of the absence of any guiding language in the statute itself, we must conclude that congress has not "unambiguously" expressed an intent on the question of what test is to be used in determining whether there has been a concentration of dumped imports in a particular region. Consequently, we must defer to the ITC's interpretation of the statutory provision in question—as represented by the approach it used in this case—unless we find such interpretation to be unreasonable

Preliminarily, we note appellants' argument that the ITC's use of the percent of imports test in this case is not entitled to, deference because the ITC departed from its practice in prior determinations by using only the percent of imports test and by applying a higher numerical cut-off under that test.[7] We disagree.

The ITC's approach in this case was not inconsistent with its prior practice The ITC has generally used the percent of imports test in analyzing import concentration. *See Texas Crushed Stone,* 822 F. Supp. at 777. It has used the ratio of import penetration test only in particular circumstances, such as when the imports outside the region were widely dispersed or when the regional industry accounted for a significant portion of the total national industry, and only after considering concentration under the percent of imports test. *See id.*

In addition, the ITC has never adopted a precise numerical cut-off in analyzing import concentration under the percent of imports test. The ITC has found sufficient concentration where the percentage of imports in the region is 80 percent or more. *See, e.g., Portland Hydraulic cement from Australia and Japan,* Inv. Nos. 731–TA–108 and 109 (Final), USITC Pub. 1440 (1983) (99 percent); *Sugars and Sirups from Canada,* Inv. No. 731–TA–3 (Final), USITC Pub. 1047 (1980) (96 percent). At the same time, the ITC has usually found insufficient concentration where the percentage was below 80 percent. *See, e.g., Certain Welded Carbon Steel Pines and Tubes from Taiwan,* Inv. No. 731–TA–211 (Final), USITC Pub. 1994 (1987) (66.3 to 79.2 percent insufficient); *Certain Welded Carbon Steel Pines and Tubes from the Philippines, and Singapore,* Inv. Nos. 731–TA–293, 294 and 296 (Final), USITC Pub. 1907 (1986) (69.2 to 80.1 percent insufficient). However, the ITC has found import concentration at lower levels. *See Certain Steel Wire Nails from the Republic of Korea,* Inv. No. 731–TA–26 (Final), USITC Pub. 1088 (1980) (43 percent sufficient). In short, the ITC's record in this area is one of an individualized case-by-case method of analysis. There is no merit to the argument that the ITC departed from such an approach in this case.

[7] Prior agency practice is relevant in determining the amount of deference due an agency's interpretation. An agency's interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n.30 (1987).

Turning to the question of whether the ITC's interpretation of the statute was reasonable and whether the ITC properly exercised its discretion in applying the percent of imports test, we observe that the ITC's case-by-case approach in analyzing import concentration in a region takes into account the competing interests reflected in the antidumping statute. The statute allows the ITC to find injury based upon a regional analysis in appropriate circumstances. This is because a national analysis can obscure significant injury that may fall disproportionately on an isolated region. However, antidumping duties assessed on the basis of injury to a regional industry are applicable not only to that region, but also to the rest of the United States. *See Gray Portland Cement and Cement Clinker from Venezuela,* Inv. Nos. 731–TA–519, 303–TA–21 (Prelim.), USITC Pub 2400 (1991) (views of Commissioners Lodwick and Newquist) (concern that "regional analysis be utilized only in appropriate circumstances in order to prevent imposing duties on imports sold in the entire national market in cases in which the detrimental impact of the imports is limited to a small segment of that market").

We believe the ITC's case-by-case approach represents a "legitimate policy choice[ ] made by the agency in interpreting and applying the statute." *Suramerica,* 966 F.2d at 665. Under that approach, the ITC uses the ratio of import penetration test only in particular circumstances, such as when the imports outside the region are widely dispersed throughout the rest of the country or when the regional industry accounts for a significant portion of the total national industry, and only after analyzing concentration under the percent of imports test. *See Texas Crushed Stone,* 822 F. Supp. at 777. The ITC uses the ratio of import penetration test in such circumstances because the imposition of duties on the subject imports is less likely to disrupt trade outside the region if imports are widely dispersed, and the justification for relief is stronger if the regional industry accounts for a significant portion of the total national industry.

In this case, imports of crushed limestone outside the Southeast Texas Region were not widely dispersed, but were found overwhelmingly in the 10-state Mississippi River/Gulf Coast region. *Id.* at 779. The imposition of antidumping duties based upon an analysis of injury to a small region of Texas would pose a risk of disrupting trade in the rest of the country, namely the 10-state Mississippi River/Gulf Coast region. As just seen, in such circumstances, the ITC typically uses the percent of imports test and declines to use the ratio of import penetration test. We hold that the ITC acted reasonably and did not abuse its discretion in applying the percent of imports test in this case.

B

Finally, appellants contend that the ITC's ruling was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because the ITC violated the legal standard for making a negative preliminary determination set forth in *American Lamb,* 785 F.2d at 1001.

As they did before the CIT, appellants argue that the ITC failed to consider relevant evidence that imports into the region might have increased sufficiently to be considered concentrated by the time of the final determination. Appellants also contend that the ITC failed to consider evidence of material injury and threat of material injury. Appellants' contentions are without merit.

As noted above, in a preliminary antidumping investigation, the ITC must determine whether there is a *reasonable indication* that an industry in the United States is materially injured, or threatened with material injury 19 U.S.C. § 1673b(a) (1988) (emphasis added). In *American Lamb,* 785 F.2d at 1001, this court upheld the ITC's practice of making negative determinations under the "reasonable indication" standard in preliminary investigations when: "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation." In this case, the ITC based its concentration analysis on the complete record. We agree with the CIT that there was no reason for the ITC to believe that contrary evidence would arise in a final investigation. *Texas Crushed Stone,* 822 F. Supp. at 781. As we noted in *American Lamb,* "[t]he statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry." *American Lamb,* 785 F.2d at 1001.

As for appellants contention that the ITC should have considered evidence of material injury or threat of material injury, the statute provides, in pertinent part, that in the case of a regional industry, material injury or the threat of material injury may be found "if there is a concentration of * * * dumped imports into such an isolated market *and* if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury * * *, by reason of the * * * dumped imports." 19 U.S.C. § 1677(4)(C) (1988) (emphasis added). Thus, both concentration and material injury or the threat of material injury are prerequisites that must be met for an affirmative determination under a regional industry analysis. Here, the ITC determined that the requirement of concentration of dumped imports into the regional market was not satisfied. Under these circumstances, it could not proceed to the issue of material injury or threat of material injury. Accordingly, there was no need to examine evidence relevant only to that issue.

CONCLUSION

The ITC's negative preliminary determination was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Therefore, we affirm the judgment of the CIT sustaining that determination.

COSTS

Each party shall bear its own costs.

AFFIRMED

TIMKEN CO., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE, AND KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A., INC., DEFENDANTS-APPELLEES, AND NSK LTD. AND NSK CORP., DEFENDANTS-APPELLEES

Appeal No. 93–1312 and 93–1455

(Decided September 27, 1994)

Terence P. Stewart, Stewart & Stewart, of Washington, DC, argued for plaintiff-appellant. With him on the brief were *Eugene L. Stewart*, *James R. Cannon, Jr.*, *John M. Breen* and *Vincent J. Branson*.

Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were *Frank W. Hunger*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief were *Stephen J. Powell*, Chief Counsel, *Berniece A. Browns*, Senior Counsel and *Joan L. MacKenzie*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

James A. Geraghty, Donohue & Donohue, of New York, New York, argued for defendants-appellees, NSK, LTD. and NSK Corporation. *Joseph F. Donohue. Jr.*, and *Kathleen C. Inguaggiato*, of Donohue & Donohue were on the brief for defendants-appellees.

Before ARCHER, *Chief Judge**, FRIEDMAN, *Senior Circuit Judge*, and RADER, *Circuit Judge*.

RADER, *Circuit Judge*.

The United States Court of International Trade affirmed the International Trade Administration's (ITA) imposition of dumping duties on tapered roller bearings four inches or less in diameter (TRBs) imported by NSK, Limited (NSK) from April 1, 1974 through July 31, 1980, and by Koyo Seiko Company, Limited (Koyo Seiko) from April 1, 1974 through March 31, 1979 (1974–80 entries, collectively). *Koyo Seiko Co. v. United States*, 819 F. Supp. 1093 (Ct. Int'l Trade 1993) (affirming ITA's ultimate calculations of duties and dismissing all appeals related to the 1974–80 entries), *aff'd in part, rev'd in part, and remanded*, 20 F.3d 1160, ___ Fed. Cir. (T) ___ (Fed. Cir. 1994). The trial court also affirmed ITA's imposition of duties on TRBs imported by NSK and Koyo Seiko from August 1, 1986 through July 31, 1987 (1986–87 entries). *Timken Co. v. United States*, 809 F. Supp. 121 (Ct. Int'l Trade 1992). In both cases, the Court of International Trade upheld ITA's denial of interest payments under 19 U.S.C § 1677g(a) (1988) on underpayments of antidumping duties. For the 1974–80 entries, the trial court also upheld ITA's decision to exclude United States subsidiary profits from calculation of exporter's sales price (ESP) under 19 U.S.C. § 1677a(e)(1) (1988). Because ITA correctly applied sections 1677g and 1677a(e)(1), this court affirms.

BACKGROUND

On October 31. 1973, the Timken Company (Timken) petitioned the Department of Treasury to impose antidumping duties on TRBs

* Judge Archer assumed the position of Chief Judge on March 18, 1994.

manufactured in Japan. *Tapered Roller Bearings From Japan: Antidumping Proceeding Notice,* 38 Fed. Reg. 33,408 (Dep't Treas. 1973). Under the Antidumping Act of 1921. 19 U.S.C. §§ 160–173 (1970) (repealed 1980) (the 1921 Act), then in effect, Treasury initiated an investigation and found that TRBs were being, or were likely to be, sold at less than fair value *Tapered Roller Bearings From Japan: Antidumping Determination of Sales at Less Than Fair Value,* 39 Fed. Reg. 32,337 (Dep't Treas. 1974). On January 29, 1975, the International Trade Commission (ITC) published its determination that the domestic industry was likely to be injured by sales of TRBs imported from Japan. *Tapered Roller Bearings and Certain Components Thereof From Japan: Determination of Likelihood of Injury,* 40 Fed, Reg. 4.366 (Int'l Trade Comm'n 1975). Treasury then issued its dumping finding on August 18, 1976 *Tapered Roller Bearings and Certain Components From Japan,* 41 Fed. Reg. 34,974 (Dep't Treas. 1976). Treasury issued master lists which set bonding rates for NSK and Koyo Seiko. The bonding rates varied from 0% to 12%. Treasury did not calculate an estimated dumping margin. NSK and Koyo Seiko were consequently not required to make cash deposits of estimated dumping duties. Instead, NSK and Koyo Seiko TRBs were entered under bond. The bonds guaranteed payment of the margins to be set by a final determination. These entries were never liquidated.

In 1980, the Department of Commerce replaced the Department of Treasury as the administering authority of the antidumping law. Exec. Order No. 12,188, 3 C.F.R. 131, 133 (1981), *reprinted in* 19 U.S.C § 2171 note (1988). Also, the Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 144 (1979) (codified as amended in scattered sections of 19 U.S.C.) (1979 Act), repealed the 1921 Act and established new administrative procedures for administration of antidumping law. The 1979 Act subjected Treasury dumping findings made under the 1921 Act to annual administrative review by the ITA, an agency within Commerce. The 1979 Act, sec. 101, § 751(a), 93 Stat. 175 (1979) (current version at 19 U.S.C. § 1675(a) (1988)). Under this statutory mandate, ITA undertook review of the 1976 dumping finding. *Administrative Review of Antidumping Determinations,* 45 Fed. Reg. 20,511 (Dep't Comm. 1980). Annual administrative reviews proceeded until a 1984 amendment to 19 U.S.C. § 1675(a) made administrative review available only upon request Trade and Tariff Act of 1984, Pub. L. 98–573, § 611(a)(2)(A), 98 Stat. 2948, 3031 (amending 19 U.S.C. § 1675(a)(1) (1982)). Timken requested such reviews for the entries at issue in this appeal.

I. *The 1974–80 Entries:*

After a lengthy administrative process, ITA published its final determinations covering the 1974–80 entries on June 1, 1990. *Tapered Roller Bearings Four Inches or Less in Outside Diameter Prom Japan: Final Results of Antidumping Duty Administrative Review,* 55 Fed. Reg 22,369 (Dep't Comm. 1990) (Final Results for 1974–80 Entries). ITA set the dumping margins at 4.99% to 23.43% for NSK, and 18.81% to

35.89% for Koyo Seiko *Id.* at 22,382. ITA required no interest payments under 19 U.S.C. § 1677g(a) (1988) on unpaid duties owed by NSK and Koyo Seiko. Final Results for 1974–80 Entries, 55 Fed. Reg. at 22,370 Section 1677g(a) demands interest on "overpayments and underpayments of amounts deposited on merchandise entered." ITA determined that "amounts deposited" in section 1677g(a) refers only to cash deposits of estimated antidumping duties, and not to securities such as posted bonds. Final Results for 1974–80 Entries, 55 Fed. Reg. at 22,370.

ITA also declined to deduct the profits earned by the importers' United States subsidiaries from ESP under 19 U.S.C. § 1677a(e)(1) (1988). Final Results for 1974–80 Entries, 55 Fed. Reg. at 22,371. ITA refused to extend section 1677a(e)(1), which provides for reductions to ESP for "commissions for selling in the United States the particular merchandise under consideration," to encompass such profits. Final Results for 1974–80 Entries, 55 Fed. Reg. at 22,370. In addition, ITA remarked that "a deduction from United States price for profit without a corresponding adjustment to foreign market value would lead to unfair comparisons of prices *Id.*

Timken appealed various aspects of ITA's Final Results for the 1974–80 Entries twice to the Court of International Trade. In its first appeal, Timken challenged ITA's decision not to impose interest under section 1677g(a) for duties owed on the 1974–80 entries. *Timken Co. v. United States,* 777 F. Supp. 20 (Ct. Int'l Trade 1991) *(Timken I).* The Court of International Trade upheld the agency's interpretation of "amounts deposited" in section 1677g(a). *Id.* at 27. In support of this decision, the court noted that "the provision requiring cash deposits of estimated duties [19 U.S.C. § 1673e(a)(3) (1988)] and the interest provision [section 1677g(a)] were intended to operate simultaneously." *Id.* at 26. Noting the deference afforded ITA's interpretation of the antidumping statute, the court affirmed ITA's determination that section 1677g(a) applies only to cash deposits of estimated duties. *Id.* at 27. The court also declined to impose interest under 19 U.S.C. § 580 (1988) or in equity. *Id.*

In the second appeal to the Court of International Trade, Timken challenged, *inter alia,* ITA's refusal to deduct the profits of the Japanese exporters' domestic subsidiaries from ESP calculations. *Timken Co. v. United States,* 795 F. Supp. 438, 440 (Ct. Int'l Trade 1992) *(Timken II).* Relying on previous Court of International Trade decisions rejecting Timken's interpretation of the term "commissions" in section 1677a(e)(1) as including profits, the court agreed with ITA's interpretation *Id.* at 445. The court affirmed ITA's determinations, remanding for recalculation of the dumping margins for other reasons. *Id.* at 448–49. The Court of International Trade affirmed the remand results on March 4, 1993 and dismissed the appeals relating to the 1974–80 entries. *Koyo Seiko Co.,* 819 F. Supp. at 1096. Timken appealed to this court.

II. *The 1986–87 Entries:*

In 1990, ITA published the final results for the 1986–87 entries *Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof From Japan; Final Results of Antidumping Duty Admin. Review,* 55 Fed. Reg. 38.720 (1990) (Final Results for 1986–87 Entries). ITA set dumping margins at 52.17% for Koyo Seiko and 35.00% for NSK. *Id.* at 38,729. ITA again exempted the importers from interest payments under section 1677g(a). *Id.* at 38,726–27.

On November 25, 1992, the Court of International Trade affirmed ITA's interpretation of section 1677g(a) for the 1986–87 entries. *Timken Co. v. United States,* 809 F. Supp. 121, 122–23 (Ct. Int'l Trade 1992) *(Timken III).* The trial court relied in part on its earlier disposition of this issue in *Timken I* to reject Timken's interpretation of section 1677g(a) as requiring interest on duties owed by NSK and Koyo Seiko *Timken III,* 809 F. Supp. at 122. The court also rejected Timken's attempt to distinguish *Timken I* on the ground that the entries covered in *Timken I* almost all occurred before the enactment of section 1677g(a). The 1986–87 entries, by contrast, occurred when the 1979 Act was in full effect. The trial court, however, noted that the statute unambiguously requires interest "only on deposits and not on bonds." *Timken III,* 809 F. Supp. at 122. The court remanded only for correction of computer programming errors unrelated to this appeal. The Court of International Trade affirmed the remand results on June 8, 1993. *NSK, Ltd. v. United States,* No. 90–10–00543, –00546, –00548, 1993 Ct. Int'l Trade LEXIS 98 (June 8, 1993). In a separate appeal, Timken appealed this decision to this court. By order dated August 23. 1994 this court consolidated both appeals

ANALYSIS

Under 19 U.S.C. § 1516a(b)(1)(B) (1988), the Court of International Trade reviews dumping determinations for substantial evidence in factual findings and correctness in legal conclusions. This court applies anew the statute's express judicial review standard when reviewing the trial court's decision. *Koyo Seiko Co. v. United States,* 20 F.3d 1160, 1164, ___ Fed. Cir. (T) ___, ___ (Fed. Cir. 1994) (citing *PPG Indus., Inc. v. United States,* 978 F.2d 1232, 1236, ___, Fed. Cir. (T) ___, ___, (Fed. Cir. 1992)).

I

Under the 1921 Act, Treasury did not impose interest on underpayments of estimated duties. The 1979 Act gave Commerce authority for the first time to assess interest. The 1979 Act, sec. 101, § 778(a), 93 Stat. at 188 (current version at 19 U.S.C. § 1677g(a)).

Section 1677g(a) provides:

> Interest shall be payable on overpayments and underpayments of *amounts deposited* on merchandise entered, or withdrawn from warehouse, for consumption on and after—

> (1) the date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title, or
> (2) the date of a finding under the Antidumping Act, 1921.

19 U.S.C § 1677g(a) (emphasis added). Thus, section 1677g(a) requires payment of interest on the difference between deposited amounts of estimated duties and final assessed duties. This court reviews *de novo* the trial court's determination that "amounts deposited" refers only to cash deposits. not to bond amounts.

In interpreting section 1677g(a), this court first consults the language of the statute itself. *See Chaparral Steel Co. v. United States,* 901 F.2d 1097, 1100–01, 8 Fed. Cir. (T) 101, 105 (Fed. Cir 1990). If the statute is clear on its face, then this court's review ends. *Id.* at 1101. If the statute is not clear on its face, then this court reviews ITA's interpretation to determine whether it is reasonable in light of the language, policies, and enactment history of the statute. *Id.* (citing *Corning Glass Works v. United States Int'l Trade Comm'n,* 799 F.2d 1559, 1565, 230 USPQ 822, 826 (Fed. Cir. 1986)). This court accords ITA considerable deference in its interpretations of these statutory provisions. *Daewoo Elecs. Co. v. International Union of Elec., Elec., Technical Salaried & Machine Workers,* 6 F.3d 1511, 1516, ____ Fed. Cir. (T) ____, ____ (Fed. Cir. 1993), *cert. denied* 114 S. Ct. 2672 (1994).

The language of section 1677g(a) imposes interest only on "amounts deposited." Section 1677g(a) in isolation does not specify the meaning of "amounts deposited." In the context of the rest of the statutory scheme set forth in the 1979 Act, however, the meaning of this language becomes apparent.

Title 19, Chapter 4, Subtitle IV, Part II of the United States Code—"Imposition of Antidumping Duties"—as a general rule links the word "deposit" to "cash." For instance, sections 1673b(d)(2) and 1673d(c)(1)(B) use the term "deposit" in conjunction with "cash " 19 U.S.C. §§ 1673b(d)(2), 1673d(c)(1)(B) (1988). *See also* 19 U.S.C. §§ 1673c(f)(2)(A)(iii), 1673c(h)(3)(B), 1673d(c)(2)(B). 1673d(c)(3)(B), 1673d(c)(4)(A) (1988). The Act clearly distinguishes cash deposits from bonds or other securities. *See, e.g.,* § 1673b(d)(2) ("cash deposit, bond or other security"); § 1873d(c)(1)(B) ("posting of a cash deposit, bond, or other security") § 1673d(c)(3)(B) ("release any bond or other security, and refund any cash deposit required"). This association shows that the 1979 Act generally uses the term "deposit" to denote cash payments.

More important, the 1979 Act limits, with some exception, the use of bonds to the pre-duty order, investigative phase of antidumping proceedings. Section 1673e(a) provides that ITA, upon notification of an affirmative ITC injury determination, shall publish an antidumping duty order which

> requires the *deposit of estimated antidumning duties* pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.

19 U.S.C. § 1673e(a)(3) (1988) (emphasis added).[1] *See also* 19 U.S.C. § 1673g(a) (1988) (requiring persons by whom or for whose account the merchandise was imported to "deposit [ ] * * * an estimated antidumping duty in an amount determined by the administering authority"). The estimated antidumping duty deposits, required upon publication of an antidumping duty order under section 1873e differ from the cash deposits, bonds or other security required during the investigative phase under sections 1673b(d)(2) and 1673d(c)(1)(B).

Section 1673e(c) further distinguishes estimated duty deposits—cash deposits—from bonds by allowing posting of the latter in lieu of the former under certain conditions 19 U.S.C. § 1673e(c) (1988). Section 1673e(c)(1) states:

> The administering authority may permit, for not more than 90 days after the date of publication of an [antidumping duty] order * * *, the posting of a bond or other security *in lieu of* the deposit of estimated antidumping duties required under [section 1673e(a)(3)] * * *.

19 U.S.C. § 1673e(c)(1) (emphasis added). Section 1673e(c)(1) gives ITA discretion to permit either posting of a bond, or a cash deposit, for ninety days. It requires cash deposits only after ninety days.

The enactment history of the 1979 Act further supports the distinction between cash and bonds. In explaining the bill, a House of Representatives committee reported:

> The second major change is the requirement that merchandise subject to an antidumping order may be entered only upon the deposit of estimated antidumping duties. Under present practice such merchandise may enter under bond. The Committee feels strongly that this practice does not sufficiently deter dumping * * *. The Committee believes that the requirement of *cash deposits* will ensure that complete information will be submitted to the Authority in a timely manner.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 69 (1979) (emphasis added) The House Committee on Ways and Means also noted:

> The Committee recognizes the effect that the requirement of a cash deposit of estimated duties may have on importers, particularly small businesses, and does not wish to unduly burden those importers who have, in fact, taken steps to eliminate dumping.
>
> [The] bill provides a limited *exception to the requirement of a deposit of estimated duties* for importers * * *. Thus, for a three month

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[1] Title 19 also distinguishes cash deposits from bonds in the context of estimated customs duties. Section 1505 governs payment of estimated customs duties:

> (a) Deposit of estimated duties
>
> Unless merchandise is entered * * * under bond, the importer of record shall deposit * * * the amount of duties estimated by such customs officer to be payable thereon.
>
> (b) Collection or refund
>
> The appropriate customs officer shall collect any increased or additional duties due or refund any excess of duties deposited as determined on a liquidation or reliquidation.

19 U.S.C. § 1505 (a), (b) (1988). Note also that 19 U.S.C. §§ 197, 198 (1988) provide that customs duties must be paid in either cash or cash equivalents such as certified checks, coin certificates, or Treasury notes. Thus, estimated customs duty deposits are cash deposits. This provision supports the notion that section 1673e(a)(3) estimated antidumping duty deposits, required at the same time as estimated customs duty deposits, are also cash deposits.

> period following the issuance of an antidumping order, the Authority may continue to permit entry of merchandise subject to the order under *bond* * * *.

Id. at 69–70 (emphasis added). These passages underscore the 1979 Act's different treatment of cash deposits and bond amounts. Thus, the 1979 Act draws a clear distinction between a "deposit" in cash and a "bond or other security" with respect to estimated antidumping duties.

Section 1673f addresses overpayments and underpayments of estimated antidumping duties. Section 1673f(a) states:

> If the amount of a *cash deposit collected as security for an estimated antidumping duty* under section 1673b(d)(2) * * * is different from the amount of the antidumping duty determined under an antidumping duty * * * order then the difference * * * shall be—
>
> (1) disregarded, to the extent the cash deposit collected is lower than the duty under the order, or
>
> (2) refunded, to the extent the cash deposit is higher than the duty under the order

19 U.S.C. § 1673f(a) (1988) (emphasis added). This provision refers to cash deposits posted pursuant to section 1673b(d)(2) during the pre-antidumping order, investigative phase. Section 1673f(a) does not provide for any interest payments.

Section 1673f(b), however, refers to the "amount of estimated antidumping duty deposited under section 1673e(a)(3)"—estimated duties required by the antidumping duty order. Section 1673f(b) provides:

> If the amount of an estimated antidumping duty deposited under section [1673e(a)] * * * is different from the amount of the antidumping duty determined under an antidumping duty order * * * then the difference * * * shall be—
>
> (1) collected, to the extent that the deposit under section 1673e(a)(3) * * * is lower than the duty determined under the order, or
>
> (2) refunded, to the extent that the deposit under section 1673e(a)(3) * * * is higher than the duty determined under the order,
>
> *together with interest as provided by section 1677g* of this title.

19 U.S.C. § 1673f(b) (1988) (emphasis added).

Title 19 contains similar provisions pertaining to countervailing duties. Section 1671b(d)(2) requires ITA to "order the posting of a cash deposit, bond, or other security" upon an affirmative preliminary determination that a subsidy is being provided with respect to the merchandise under investigation. 19 U.S.C. § 1671b(d)(2) (1988). Section 1671e(a) provides for publication of a countervailing duty order which "requires the deposit of estimated countervailing duties * * * at the same time as estimated normal customs duties on that merchandise are deposited." 19 U.S.C. § 1671e(a)(4) (1988). Title 19 again differentiates between security deposits, as required by section 1671b(d)(2), and

deposits of estimated duties, required by section 1671e(a), in section 1671f. Section 1671f(a) provides:

> If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated countervailing duty under section 1671b(d)(2) * * * is different from the amount of the countervailing duty determined under a countervailing duty order issued under section 1671e * * * then the difference * * * shall be—
>
> (1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or
>
> (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order

19 U.S.C. § 1671f(a) (1988). For security posted under section 1671b(d)(2), section 1677g—the interest provision—does not apply. Section 1671f(b) applies to estimated countervailing duties:

> If the amount of an estimated countervailing duty deposited under section 1671e(a)(3) * * * is different from the amount of the countervailing duty determined under a countervailing duty order * * * then the difference * * * shall be—
>
> (1) collected, to the extent that the deposit * * * is lower than the duty determined under the order, or
>
> (2) refunded, to the extent that the deposit * * * is higher than the duty determined under the order,
>
> *together with interest as provided by section 1677g* of this title.

19 U.S.C. § 1671f(b) (1988) (emphasis added).

The "amounts deposited" term of section 1677g(a) thus refers to a deposit of estimated duties. Section 1673e(c) clearly separates bonds or other securities from "deposit[s] of estimated antidumping duties." Accordingly, "amounts deposited" in section 1677g(a) refers solely to cash deposits of estimated duties provided under sections 1671e(a)(4) and 1673e(a)(3). Section 1677g(a)'s "amounts deposited" language does not encompass bonds. ITA and the trial court interpreted the above statutory scheme correctly by restricting the term "amounts deposited" in section 1677g(a) to cash deposits. *See* 19 C.F.R. §§ 353.24, 355.24 (1994) (requiring interest on the difference between cash deposits of estimated duties and assessed duties).

Contrary to Timken's assertion, recent amendments to section 1677g(a) did not alter the limitation of "amounts deposited" to cash payments. The Trade and Tariff Act of 1984, Pub. L. No. 98–573, sec. 621, § 778, 98 Stat. 3039 (1984 Act), merely changed the moment from which interest accrues. Instead of imposing interest from the date of an affirmative final determination under the 1979 Act, the 1984 Act amended section 1677g(a) to count interest from the date of either publication of a duty order under the 1979 Act or a dumping finding under the 1921 Act. This amendment, while altering the date from which interest would accrue, did not abolish the requirement of depositing estimated duties before exporters would be liable for interest under section 1677g(a).

The Tax Reform Act of 1986, Pub. L. No. 99–514, sec. 1886, § 708, 100 Stat. 2922, 2923 (1986), specified that merchandise not liquidated by

November 4, 1984, was subject to interest payments under section 1677g(a). Again, this enactment did not disturb the scope of the phrase "amounts deposited." In order to be liable for or entitled to interest under section 1677g(a), exporters must have made cash deposits of estimated duties. In the instant case, neither Treasury nor Commerce required Koyo Seiko or NSK to make cash payments of estimated antidumping duties. Instead these importers posted bonds. The 1979 Act associates bonds with "security." Thus, the Act intended bonds to serve as a means of securing payment, not a method of payment. Therefore, when Treasury and ITA did not require cash deposits of estimated duties over the period of sixteen years, they relieved Koyo Seiko and NSK of the duty to make interest payments. Without an obligation to pay estimated duties, section 1677g(a) cannot apply.

This court's recent decision in *Daewoo* does not compel a different result. In *Daewoo,* this court upheld ITA's decision to treat bonds and cash deposits similarly in the context of the cap on duties in 19 U.S.C. § 1673f(a). *Daewoo,* 6 F.3d at 1523. First, this court reached its result in *Daewoo* by sustaining ITA's regulation interpreting section 1673, 6 F.3d at 1521, a method of reasoning which also supports ITA's regulations, 19 C.F.R. §§ 353.24, 355.24, limiting section 1677g(a) solely to cash in this case.

More important, however. section 1673f(a) is very different from section 1673(f)(b), which expressly provides for interest under section 1677g(a). Section 1673f(a) places a cap on assessed duty rates when an importer subject to an affirmative preliminary determination makes a "cash deposit." 19 U.S.C. § 1673f(a). ITA's regulation permits both cash and bonds to institute a cap under section 1673f(a). 19 C.F.R. § 353.23 (1994). Under section 1673b(d)(2), both cash deposits and bonds are security for future duty assessments. Because both forms of security perform the same function under section 1673b(d)(2), ITA properly treats them similarly as this court affirmed in *Daewoo.*

Furthermore, ITA's interpretation of section 1673f(a) is consistent with the corresponding countervailing duty provision, section 1671f(a). Section 1671f(a) provides a cap for countervailing duties equal to the "amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated countervailing duty under section 1671b(d)(2)." 19 U.S.C. § 1671f(a). By equating this language with section 1673f(a)'s "cash deposit collected as security," ITA interpreted the antidumping duty law consistently with the countervailing duty law. *See American Alloys, Inc. v. United States,* 1994 U.S. App. LEXIS 19254, at *12–13 (Fed. Cir. July 17, 1994) (noting that the 1974 amendments to the Trade Reform Act of 1973 sought to harmonize antidumping and countervailing duty laws). In both the antidumping and countervailing duty contexts, the statute acts to limit liability to the amount of cash, bond, or other security posted under section 1671b(d)(2) or section 1673b(d)(2).

Sections 1671f(b) and 1673f(b), however, provide for interest on over- and underpayments of estimated duties imposed by sections 1671e(a)(3) and 1673e(a)(3). Under section 1673e(a)(3), a cash deposit acts as a method of payment of preliminary duties. A bond, permitted only under the circumstances described in section 1673e(c), acts as security for undetermined future payments. In the context of the language of section 1677g(a), this distinction further supports ITA's different treatment of cash and bonds.

In sum, the requirement to make cash deposits of estimated duties, under the duty order, triggers the interest provision. Without the duty order, the importer has no obligation to make a cash deposit and consequently no obligation to pay interest. The Court of International Trade did not err in upholding ITA's determination that NSK and Koyo Seiko are not liable for interest under section 1677g(a).

Finally, this court declines to impose interest in equity. This court will not act in a manner contrary to a statutory provision dealing with the precise issue. *See Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1582 (Fed. Cir. 1993).

II

Title 19 provides for calculation of the ESP in section 1677a (1988). Section 1677a(c) defines ESP:

> For purposes of this section, the term "exporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e) of this section.

Section 1677a(e) sets forth adjustments to the ESP. Section 1677a(e)(1) addresses the deduction for commissions earned in the sale of imported goods.

> For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—
>
> (1) *commissions* for selling in the United States the particular merchandise under consideration * * *.

19 U.S.C. § 1677a(e)(1) (1988) (emphasis added).

The 1979 Act does not expressly define the term "commissions. Again this court begins with the statutory language. *See Chaparral Steel,* 901 F.2d at 1100–01. The usual and customary meaning of the word "commissions" does not include profits. For instance, Random House defines "commission" as "a sum or percentage allowed to agents sales representatives, etc., for their services." Random House Unabridged Dictionary 412 (2nd ed. 1993). Thus, the meaning of the language itself forecloses a deduction for profits.

The enactment history supports the meaning of the statutory language. In a report on the antidumping bill, the Senate Committee on Finance stated that "the definition of 'exporter's sales price' requires the deduction * * * of any amount included in such price attributable to

(1) any costs, charges, United States import duties and expenses [and] (2) any *commissions* for selling the particular merchandise in the United States." S. Rep. No. 16, 67th Cong., 1st Sess. 12 (1921) (emphasis added). This explanation of ESP does not refer to profits or contravene the conventional meaning of "commissions." In sum, the record shows no error in the trial court's reading of section 1677a(e)(1).

CONCLUSION

The Court of International Trade correctly interpreted 19 U.S.C. §§ 1677g, 1677a(e)(1) (1988). Thus, this court affirms the Court of International Trade's decisions upholding ITA's remand results for the 1974–80 entries in *Koyo Seiko Co. v. United States*, 819 F. Supp. 1093 (Ct. Int'l Trade 1993), *aff'd in part, rev'd in part, and remanded*, 20 F.3d 1160, ____ Fed. Cir. (T) ____ (Fed. Cir 1994), and for the 1986–87 entries in NSK, No. 90–10–00543, –00546, –00548.

COSTS

Each party shall bear its own costs.

AFFIRMED

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS-APPELLEES, AND ISUZU MOTORS, LTD., AND AMERICAN ISUZU MOTORS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-APPELLANT

Appeal No. 93–1525

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., INC., PLAINTIFFS-APPELLEES, AND ISUZU MOTORS, LTD., AND AMERICAN ISUZU MOTORS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT-APPELLANT, AND TIMKEN CO., DEFENDANT-APPELLANT

Appeal No. 93–1534

(Decided September 30, 1994)

Susan P. Strommer, Powell, Goldstein, Frazer & Murphy, of Washington, DC, argued for plaintiffs-appellees. With her on the brief was *Peter O. Suchman*. Of counsel were *T. George Davis* and *Elizabeth C. Hafner*.

George Kleinfeld, Paul, Weiss, Rifkind, Wharton & Garrison, of Washington, DC, represented plaintiffs.

Velta A. Melnbrencis, Department of Justice, of Washington, DC, argued for defendant. Of counsel were *David M. Cohen*, Department of Justice, *Stephan J. Powell*, *Joan McKenzie*, *Berniece Browne* and *Linda S. Chang*, Department of Commerce.

Geert DePriest, Stewart & Stewart, of Washington, DC, argued for defendant-appellant. Terence P. Stewart, *James R. Cannon, Jr.* and *Margaret E.O. Edozien*, Stewart & Stewart, of Washington, DC, were on the brief for defendant-appellant. Of counsel was *John M. Breen*.

Frederick L. Ikenson, Frederick L. Ikenson, P.C., of Washington, DC, was on the brief for Amicus curiae, Federal-Mogul Corporation.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before ARCHER, *Chief Judge,** LOURIE, and SCHALL, *Circuit Judges*.

SCHALL, *Circuit Judge*.

The government and The Timken Company (Timken) each appeal the January 8, 1993 decision of the U.S. Court of International Trade (Court), *Koyo Seiko Co. v. United States*, 810 F. Supp. 1287 (Ct. Int'l Trade 1993), holding, *inter alia*, that the International Trade Administration of the Department of Commerce (Commerce) erred in calculating final dumping margins for certain entries by Koyo Seiko Company and Koyo Corporation of U.S.A. (collectively, Koyo).[1] Because the Court erred by failing to defer to Commerce's reasonable interpretation of the statutory provisions at issue, we reverse and remand with instructions.

BACKGROUND

I. *The Calculation of Antidumping Duties:*

Under the statutory provision governing the imposition of antidumping duties, Commerce is required to impose additional duties on imported merchandise that is being sold, or is likely to be sold, in the United States at less than fair value to the detriment of a domestic industry 19 U.S.C. § 1673 (Supp. 1993). *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1571, 1 Fed. Cir. (T) 130, 132 (1983), *cert. denied*, 465 U.S. 1022 (1984). The amount of the duty to be imposed, otherwise known as the "dumping margin," equals "the amount by which the foreign market value exceeds the United States price for the merchandise." 19 U.S.C. § 1673 (Supp. 1994) Foreign market value is typically computed on the basis of home market sales or third country sales, as appropriate. *See* 19 U.S.C. § 1677b (Supp. 1993). United States price is measured by one of two methods—purchase price or exporter's sales price—depending upon the nature of the relationship, if any, between the importer and the exporter. 19 U.S.C. § 1677a (1988 & Supp. 1993). Where the domestic importer is unrelated to, and independent of, the foreign producer, purchase price is used. Purchase price is "the actual or agreed-to price between the foreign producer and the independent importer, prior to the time of importation." *Smith-Corona*, 713 F.2d at 1572, 1 Fed. Cir. (T) at 133. On the other hand, where the importer and exporter are related *(e.g.*, the importing corporation is a subsidiary of the exporting corporation), the United States price is measured by the exporter's sales price, which is "the price at which the foreign manufacturer or its agent sells or agrees to sell the merchandise in the United States." *The Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 399 n.2 (Fed. Cir. 1994) (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1577 (Fed. Cir.

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* Chief Judge Archer assumed the position of Chief Judge on March 18, 1994.

[1] Isuzu Motors, Ltd. and American Isuzu Motors, Inc., plaintiffs-intervenors below, are not parties to this appeal.

1993)); 19 U.S.C. § 1677a(c) (1988)). The purpose of distinguishing between purchase price and exporter's sales price is to arrive at a United States price that reflects the price that the merchandise would command in "an arm's length transaction, whether from the importer to an independent retailer or directly to the public." *See Smith-Corona,* 713 F.2d at 1572, 1 Fed. Cir. (T) at 133.

To ensure that the quantum of antidumping duties is calculated in a fair manner, both foreign market value and United States price are subject to certain adjustments in order to achieve a common point at which to perform the price comparison. We have explained:

> Foreign market value and United States price represent prices in different markets affected by a variety of differences in the chain of commerce by which the merchandise reached the export or domestic market. Both values are subject to adjustment in an attempt to reconstruct the price at a specific, "common" point in the chain of commerce, so that value can be fairly compared on an equivalent basis. While the statute does not specify *where* in the chain of commerce price is constructed, the specific statutory adjustments appear to indicate an "f.o.b. foreign port" price.

Id. at 1571–72, 1 Fed. Cir. (T) at 132 (emphasis in original).

Foreign market value is subject to several adjustments, including a "circumstances of sale" adjustment as provided in 19 U.S.C. § 1677b(a)(4). Circumstances of sale that have served as the basis for an adjustment to foreign market value include costs such as "advertising, warranty and after sales service, packing costs, and after sales rebates." *Smith-Corona,* 713 F.2d at 1573 n.12, 1 Fed. Cir. (T) at 134 n.12. United States price is adjusted according to which measure—purchase price or exporter's sales price—is used. In both purchase price and exporter's sales price transactions, the adjustment bases provided in section 1677a(d) are available *(e.g.,* certain packaging expenses, shipping costs, duties, and taxes). The additional adjustment bases set forth in section 1677a(e), however, are applicable only to exporter's sales price transactions *(e.g.,* commissions and selling expenses "generally incurred" in the United States).

After Commerce has appropriately adjusted the foreign market value and the United States price for each entry of merchandise subject to the antidumping duty order at issue, the dumping margin—*i.e.,* the amount of the antidumping duty—is calculated by subtracting United States price from foreign market value. 19 U.S.C. § 1675(a)(2)(Supp. 1994).

As discussed in more detail below, the present dispute centers on whether certain selling expenses incurred on sales of the merchandise at issue in the United States are properly accounted for by a "circumstances of sales" adjustment to foreign market value pursuant to section

1677b(a)(4), or by an adjustment to exporter's sales price pursuant to section 1677a(e)(2).[2]

II. *Facts of the Case:*

The present appeals arise from the final results of an antidumping duty administrative review conducted by Commerce determining that certain of Koyo's tapered roller bearings (TRBs)—*i.e.*, those that entered the United States during the period August 1, 1986, through July 31, 1987—were subject to a dumping margin of 52.17% *ad valorem*.[3] The administrative review was conducted upon request of the parties, pursuant to 19 U.S.C. § 1675(a), to definitively determine the amount of antidumping duties owed by Koyo on the subject merchandise.

Because Koyo Seiko Company and Koyo Corporation of U.S.A. represent a related exporter-importer pair, Commerce utilized the exporter's sales price of the merchandise in calculating the dumping margin. After calculating an initial exporter's sales price, Commerce adjusted that value, *inter alia*, pursuant to section 1677a(e)(2) by deducting therefrom all selling expenses (both "direct" and "indirect"[4]) incurred in making U.S. sales.[5] After calculating a foreign market value, and performing other adjustments and calculations not at issue in this appeal, Commerce calculated the dumping margin, pursuant to 19 U.S.C. 1675(a)(2), by subtracting exporters sales price from foreign market value.

Pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii), Koyo filed suit in the Court of International Trade to challenge the methodology used by Commerce in calculating the dumping margin for the TRB entries at issue. In particular Koyo asserted that Commerce abused its discretion in deducting Koyo's direct selling expenses from exporter's sales price. Instead, Koyo argued, Commerce should have added the direct selling

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[2] Interestingly, either method of calculation results in an identical "absolute" dumping margin value (difference between foreign market value and United States price). What varies according to the calculation method used is "weighted-average dumping margin," which is defined as the aggregated dumping margins divided by the aggregated United States prices (in this case, the exporter's sales prices). 19 C.F.R. § 353.2(f)(2) (1994). The weighted-average dumping margin is the estimated rate at which the U.S. Customs service will collect duties on future entries until the actual dumping duties are determined in a future administrative review. *See* 19 C.F.R. § 353.21(b) (1994) (specifying that an antidumping duty order shall instruct the U.S. Customs Service to "require a cash deposit of estimated antidumping duties equal to the amount of the estimated weighted-average dumping margin" for each entry of merchandise); 19 C.F.R. § 353.22 (1994) (outlining procedures for requesting and conducting administrative review, including recalculation of weighted-average dumping margin). *See also Al Tech Specialty Steel Corp. v. United States*, 745 F.2d 632, 634–36, 3 Fed. Cir. (T) 1, 4–5 (1984) (discussing antidumping duty assessment and collection procedures). In the present case, the calculation method approved by the Court results in a lower weighted-average dumping margin than under the calculation method advanced by Commerce, thus resulting in the collection of a lesser amount of estimated antidumping duties. This is because, under Commerce's approach, the figure for aggregated United States prices, by which aggregated dumping margins are divided, is smaller (because of deductions therefrom) than under the Court's approach.

[3] *Tapered Roller bearings Four Inches or Less in Outside Diameter and Certain Components Thereof From Japan*, 55 Fed. Reg. 38,720 (Dep't Comm. 1990) (final admin. review).

[4] Direct selling expenses are "expenses which vary with the quantity sold, such as commissions." *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1035, 3 Fed. Cir. (T) 83, 84–85 (1985). In contrast, indirect selling expenses are those that do not vary with the quantity sold, "*e.g.*, overhead." *See Id.*

[5] In other words, the United States price for each entry was reduced by Koyo's direct selling expenses incurred in the United States. Consequently, the aggregated United States prices for Koyo's entries were also reduced, thereby resulting in an *increased* weighted-average dumping margin. *See* 19 C.F.R. § 353.2(f)(2). Because the weighted-average dumping margin equals the amount of estimated duties collected for each offending entry of merchandise, 19 C.F.R. § 353.21(b), an increased weighted-average dumping margin meant that higher estimated duties would be imposed on Koyo.

expenses to foreign market value as a "circumstances of sale" adjustment pursuant to 19 U.S.C. § 1677b(a)(4). The Court agreed. Relying on a line of its cases that had "interpreted section 1677a(e) to refer to indirect rather than direct selling expenses,"[6] the Court held that reductive adjustments of exporter's sales price under 19 U.S.C. § 1677a(e)(2) were limited to indirect selling expenses. *Koyo Seiko,* 810 F. Supp. at 1292. Further, the Court noted that its precedent "repeatedly held that 'direct selling expenses are properly characterized as differences in circumstances of sale' which may adjust foreign market value." *Id.* Concluding that Commerce's calculation methodology was improper as being contrary to established law. the Court remanded the case to Commerce "for recalculation of exporter's sales price, without an adjustment for direct selling expenses[, and for recalculation of] foreign market value to reflect an adjustment for direct selling expenses." *Id.* Timken and the government each challenge the Court's decision.[7]

DISCUSSION

I. STANDARD OF REVIEW

No facts are in dispute. The sole issue before us is whether the Court of International Trade erred in concluding that Commerce, in calculating the dumping margin, may not deduct direct selling expenses incurred on U.S. sales of the subject merchandise from the exporter's sales price pursuant to 19 U.S.C. § 1677a(e)(2), but rather must add the direct selling expenses to the foreign market value as a "circumstances of sale" adjustment pursuant to 19 U.S.C. § 1677b(a)(4). In reviewing a judgment of the Court of International Trade, this court decides *de novo* the proper interpretation of the governing statutory provisions. *St. Paul Fire & Marine Ins. Co. v. United States,* 6 F.3d 763, 767 (Fed. Cir. 1993). Our review is guided, however, by the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984), which states:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question or the

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[6] *See Timken Co. v. United States,* 673 F. Supp. 495, 511 (Ct. Int'l Trade 1987); *NTN Bearing Corp. of Am. v. United States,* 747 F. Supp. 726, 738–39 (Ct. Int'l Trade 1990); *Koyo Seiko Co. v. United States,* 796 F. Supp. 1526, 1531 (Ct. Int'l Trade 1992).

[7] The United States was the named defendant in Koyo's action filed in the Court of International Trade challenging the results of Commerce's administrative review. Timken was aligned as a defendant in that proceeding after its motion to intervene was granted. Although the government and Timken each appeal in a separate capacity, both parties agree that the two appeals arise from the same administrative order and judicial determination, and concern the same issue. Accordingly, we address both appeals in this single opinion

> court is whether the agency's answer is based on a permissible construction of the statute (footnotes omitted).

To survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or even the *most* reasonable interpretation. *See Zenith Radio Corp. v. United States*, 437 U.S 443, 450 (1978). Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another. *Id.* Deference to an agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws. *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994)

II. ANALYSIS

A

Our analysis begins with an examination of the relevant statutory provisions. *See VE Holding Corp. v. Johnson Gas Apliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990) ("It is axiomatic that statutory interpretation begins with the language of the statute."), *cert. denied*, 499 U.S. 922 (1991). In pertinent part, the provision governing adjustments to foreign market value states:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to
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> * * * * * * *
>
> (B) other *differences in circumstances of sale*
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> * * * * * * *
>
> then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4) (Supp. 1994) (emphasis added). The provision governing adjustments to exporter's sales price states in pertinent part that

> the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of
>
> * * * * * * *
>
> (2) *expenses generally incurred* by or for the account of the exporter in the United States *in selling* identical or substantially identical merchandise * * *.

19 U.S.C. § 1677a(e) (1988) (emphasis added). Due to the fact that the exporter and importer are related in this case, there is no question that exporter's sales price is the proper measure of United States price for calculating the dumping margin. Nor is there any question that the expenses incurred by Koyo in selling the merchandise in the United States are direct, as opposed to indirect, selling expenses. Rather, the dispute centers on which of the two above-referenced adjustment provisions is the proper vehicle to account for the selling expenses. On this point the plain language of the statutory provisions, when read together, is inconclusive.

On the one hand, it is clear that the "circumstances of sale" in section 1677b(a)(4) may include direct selling expenses. Indeed, the government concedes that direct selling expenses are considered, at least in purchase price transactions, to be "differences in circumstances of sale" and are used, as appropriate, to adjust foreign market value pursuant to section 1677b(a)(4).[8] On the other hand, we see no basis for concluding that the operative phrase appearing in the exporter's sales price provision, "expenses generally incurred * * * in selling [the] merchandise," 19 U.S.C. § 1677a(e)(2), may not include direct selling expenses incurred in making U.S. sales. The dictionary definitions proffered by Timken support the view that an undifferentiated reference to "selling expenses" includes both the direct and the indirect varieties.[9] In addition, there is no suggestion in the legislative history of the statute that, in the context of adjustments to exporter's sales price under section 1677a(e)(2), Congress meant the phrase "expenses generally incurred" to exclude direct selling expenses. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 1 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381 (hereafter, *S. Rep.);* H.R. Rep. No. 317, 96th Cong., 1st Sess. 1 (1979) (hereafter, *H.R. Rep.).* To the contrary, because the same legislative history shows that Congress embraced the distinction between indirect and direct selling expenses in another context, *see H.R.Rep.* at 76 (adjustments to foreign market value are proper if they are, *inter alia,* "directly related to the sales under consideration"), one might infer that Congress purposely avoided such a distinction in the context of determining exporter's sales price.

B

Because the plain language of the statute is not dispositive, we turn to the legislative history behind the adjustment provisions to determine whether Congress has "directly addressed the precise question at issue." *Chevron,* 467 U.S. at 843. *See also Suramerica de Aleaciones Laminadas, C.A. v. United States,* 966 F.2d 660, 667 (Fed. Cir. 1992) (attempting to discern intent of Congress from legislative history).

In its earliest form, the antidumping law distinguished between "purchase price" and "exporter's sales price" for purposes of calculating antidumping duties. *See* Antidumping Act of 1921, ch. 14, §§ 203–04, 42 Stat. 12–13 (hereafter, "the 1921 Act") "Exporter's sales price" was defined as "the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *." *Id.* § 204. Then, as now, the admin-

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[8] *See also* 19 C.F.R. § 353.56(a) (1994), which authorizes adjustments to foreign market value if the circumstances of sale "bear a direct relationship to the sales compared." Examples provided in the regulation include "differences in commissions, credit terms, guarantees, warranties, [and] technical assistance," as well as servicing, and certain advertising.

[9] Under basic principles of statutory interpretation, undefined terms in a statute are deemed to have their ordinarily understood meaning. *See, e.g., United States v. James,* 478 U.S. 597, 604 (1986) ("[W]e assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (alteration in original) (quoting *American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982)). A dictionary is an appropriate source for gleaning that "ordinary meaning." *See, E.G., Board of Educ. v. Mergens,* 496 U.S. 226, 237 (1990). In the present case, Estes, *Dictionary of Accounting* 124 (2d ed. 1992), defines "selling expense" as including various direct expenses such as those incurred in "promotion, marketing, and distribution activities; examples include advertising, sales commissions, and product shipping costs."

istering authority was authorized to make certain adjustments to exporter's sales price, including deductions of "an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical merchandise." *Id.* The purpose of deducting selling expenses from exporter's sales price was to estimate the "net amount returned to the foreign exporter"—*i.e.*, the f.o.b. foreign port price—of the merchandise by removing all of the expenses incurred after importation by the related-party importer. *Emergency Tariff and Antidumping: Hearings on H.R. 2435 Before the Senate Comm. on Finance*, 67th Cong., 1st Sess. 10–12 (1921). Because the 1921 Act made no provision for deducting analogous expenses from foreign market value, all selling expenses at that time—both direct and indirect—were deducted from exporter's sales price pursuant to section 204 of the 1921 Act. *See Bills to Amend Certain Provisions of the Antidumping Act of 1921: Hearings on H.R. 6006, 6007, 5102, 5120, 5138, 5139, and 5202 Before the House Ways and Means Comm.*, 85th Cong., 1st Sess. 14 (1957) (hereafter, "1957 House Hearings") (explaining that under the 1921 Act, exporter's sales price was adjusted, *inter alia*, by "subtract[ing] from it the commissions and selling expenses incurred in selling the product for delivery in the United States").

In 1958, the Antidumping Act was amended to permit adjustments to foreign market value for "differences in circumstances of sale." Act of August 14, 1958, Pub. L. No. 85–630, § 2, 72 Stat. 583 (hereafter, "the 1958 Act") A memorandum provided by the Treasury Department (Treasury)[10] explained the effect of the amendment with respect to one type of direct selling expense, advertising costs, as follows:

> The amendment would require that the amounts expended by the manufacturer for advertising in connection with his sales to the United States be added to his home market price for the purpose of determining foreign market value; * * * if the manufacturer paid advertising costs in the home market but not in the United States, the advertising costs would be deducted from the home market price in determining foreign market value.

An Act to Amend Certain Provisions of the Antidumping Act: Hearings on H.R. 6006 Before the Senate Comm. on Finance, 85th Cong., 2d Sess. 17 (1958) (Explanatory Memorandum submitted by Hon. A. Gilmore Flues, Assistant Secretary of the Treasury).[11] Subsequently, in 1979, the Antidumping Act was recodified generally into the form that it is today. *See* 19 U.S.C. § 1673 *et seq.* (1988 & Supp. 1994).

Koyo asserts that the explanatory memoranda submitted in support of the 1958 Act unequivocally evince a legislative intent that the circum-

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[10] Pursuant to a congressional directive contained in the Customs Simplification Act of 1956, Pub. L. No. 927, § 5, 84th Cong., 2d Sess., 70 Stat. 943, 948, the 1958 amendments to the Antidumping Act were drafted by the Treasury Department.

[11] A counterpart memo, submitted during the House hearings on the 1958 Act, dealt with a similar example, in which a foreign manufacturer paid for the American dealers' advertising costs but not for advertising in its home market. The memorandum explained that in such a case foreign market value was to be adjusted by adding such advertising costs to the home market price in order to account for the differences in circumstances of sale. *See* 1957 House Hearings, 85th Cong., 1st Sess. 32 (Explanatory Memorandum submitted by Hon. David W. Kendall, Assistant Secretary of the Treasury).

stances of sale provision introduced thereby was intended to be the sole mechanism through which direct selling expenses were treated, in both purchase price and exporter's sales price transactions. We disagree Although the memoranda clearly explain the effect of the circumstances of sale provision for the particular purchase price situations discussed therein, they contain no suggestion of what effect, if any, the added provision would have on the definition under the 1921 Act of exporter's sales price, which was not changed by the 1958 Act. There can be no doubt that the drafters of the 1958 Act were aware of the current practice with regard to exporter's sales price, which, as noted above, required a reduction for all selling expenses—both direct and indirect. "It can be presumed that Congress is knowledgeable about existing law pertinent to legislation it enacts." *VE Holding Corp.*, 917 F.2d at 1581. Therefore, we believe that if the drafters of the 1958 Act had wanted to depart from the existing definition of exporter's sales price by precluding adjustments thereto for direct selling expenses, they would have said so in clear and unequivocal terms. *See, e.g., United States v. International Business Machs. Corp.*, 892 F.2d 1006, 1009 (Fed. Cir. 1989) ("Had Congress intended to make the exemptions permanent, it knew how: it could and we believe would have used words of futurity * * *."). Because Treasury did not clearly express an intent to depart from the existing definition of exporter's sales price, we do not know what effect, if any, the 1958 Act was expected to have on situations such as the present case. Consequently, we conclude that neither the statute nor its legislative history provides an "unambiguously expressed intent," *Chevron*, 467 U.S. at 843, with regard to the precise question at issue. *See Suramerica*, 966 F.2d at 667 ("neither the statute nor the legislative history gives specific guidance on how Congress wished this issue to be decided").

C

In a situation where Congress has not provided clear guidance on an issue. *Chevron* requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable. We cannot say that Commerce's method of applying sections 1677a(e)(2) and 1677b(a)(4) in calculating antidumping duties for an exporter's sales price transaction is unreasonable. To the extent the Court of International Trade concluded otherwise, it committed reversible error.

We begin by noting that one of the purposes of the antidumping laws is to calculate antidumping duties on a fair and equitable basis. *See Smith-Corona*, 713 F.2d at 1578, 1 Fed. Cir. (T) at 140 ("One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples."); *Consumer Prods.*, 753 F.2d at 1037, 3 Fed. Cir. (T) at 87 ("one of the goals of the statute [is to achieve] a *fair* comparison between foreign and domestic market prices or values.") To this end, as long as Commerce's application of the adjustment provisions at issue are not arbitrary or illogical, we must uphold its construction even if the approach sup-

ported by the Court of International Trade is even more fair or logical. *Consumer Prods.*, 753 F.2d 1039, 3 Fed. Cir. (T) at 90.

In the present case, it appears that Commerce's approach is intended to effect an "apples with apples" comparison. More particularly, Commerce's practice evidences an attempt to make mirror-image adjustments to foreign market value and exporter's sales price so that they can be fairly compared at the same point in the chain of commerce. The procedure is as follows: In an exporter's sales price transaction, after an initial exporter's sales price is calculated, that value is adjusted, *inter alia*, pursuant to section 1677a(e)(2) by deducting therefrom all selling expenses (both direct and indirect) incurred in making U.S. sales. Then, in determining an initial foreign market value, appropriate sales are identified in the home market or third country pursuant to 19 U.S.C. § 1677b(a). Next, the initial foreign market value is adjusted, *inter alia*, by deducting therefrom a "circumstances of sale" amount to account for "any difference between the United States price and the foreign market value," 19 U.S.C. § 1677b(a)(4), for example, direct selling expenses incurred in making home market sales. In this way, the section 1677b(a)(4) adjustment to foreign market value counterbalances the section 1677a(e)(2) adjustment to exporter's sales price. As a result, the two parameters may be compared on equivalent terms.

Koyo argues that Commerce's interpretation is unreasonable because it involves handling direct selling expenses in purchase price transactions differently than in exporter's sales price transactions. In the former, direct selling expenses are added to foreign market value, whereas in the latter, direct selling expenses are deducted from United States price. Commerce's rationale for this practice was set forth in the final results of a prior antidumping administrative review, as follows:

> This difference in treatment of [exporter's sales price] and [purchase price] transactions is necessary for several reasons. One is to avoid a systematic distortion in the amount of duties assessed, which would result if the value on which dumping margins were calculated were consistently different than the entered value upon which U.S. Customs will apply the margin. Entered value is most commonly based on the price to the United States between the exporter and the importer. Purchase price will approximate the customs entered value without deducting any expenses because direct selling expenses are incurred in the exporting country and included in the price to the United States. In contrast, the basis of the exporter's sales price is the resale price in the United States, which can approximate entered value and be equivalent to purchase price only after all expenses incurred in the United States (including direct selling expenses) are deducted from exporter's sales price.]
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> * * * * * * *
>
> Another reason for the different treatment of direct selling expenses in [exporter's sales price] and [purchase price] transactions is that [United States price] must be calculated in such a way that there is no bias introduced just because there is a related importer intervening between the foreign producer and the first

> unrelated purchaser in the United States. Whether using [exporter's sales price] or [purchase price], we must calculate [United States price] based on the price to the first unrelated U.S. buyer, just as we must calculate [foreign market value] based on the price to the first unrelated home market buyer. In order to eliminate the effect of the relationship between the exporter and the importer, direct selling expenses must be deducted from [exporter's sales price].

Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From France, et al., 58 Fed. Reg. 39729, 39778 (Dep't Comm. 1993) (final admin. review). We find this rationale eminently reasonable. Commerce's interpretation accounts for the inherently different nature of purchase price and exporter's sales price. It is not surprising that Commerce feels the need to treat them differently to make a fair comparison. *Cf. Smith-Corona*, 713 F.2d at 1578, 1 Fed. Cir. (T) at 140 ("the statute does not expressly foreclose the use of two different United States price-foreign market value comparisons"). Indeed, the mere fact that Congress enacted an adjustment provision, 19 U.S.C. § 1677a(e)(2), that applies to exporter's sales price transactions, but not to purchase price transactions, lends credence to Commerce's position that the two should not be treated in the same fashion.

Contrary to Koyo's argument, neither *Smith-Corona* nor its sequel, *Consumer Products*, compels a different result than that reached here. Those cases concerned the validity of a particular regulation known as "the Exporter's Sales Price (ESP) offset cap," 19 C.F.R. § 353.15(c) (now found at 19 C.F.R. § 353.56(b)(2) (1994)), which "limit[ed] the amount of indirect costs which may be deducted on the foreign side of the equation to the amount deducted from the U.S price, when such price is based on [exporter's sales price]." *Consumer Prods.*, 753 F.2d at 1035, 3 Fed. Cir. (T) at 85. In explaining the holding of *Smith-Corona* (i.e., that foreign market value may be adjusted in exporter's sales price transactions differently from purchase price transactions), *Consumer Products* stated:

> The *[Smith-Corona]* court interpreted the statute as requiring that adjustments due to differences in circumstances of sale bear a direct relationship to the sales under consideration except when ESP is the basis for the U.S. price, in which case the statute specifies an additional deduction for all other selling expenses, that is, indirect expenses as well.
>
> Perceiving that use of a U.S. price based on ESP, with its additional deductions, thereby skewed the calculations in favor of a higher dumping margin, the administering authority promulgated 19 C.F.R. § 353.15(c) to afford an equivalent adjustment to foreign market value. This court held that the deduction, although not specifically authorized by the statute, was valid since it was an attempt to achieve one of the goals of the statute, a fair comparison between foreign and domestic market prices or values.

Consumer Prods., 753 F.2d at 1036–37, 3 Fed. Cir. (T) at 86–87 (footnote omitted). In other words, this court merely held that, because indirect

expenses were allowed to be deducted from exporter's sales price, Commerce may properly offset that deduction by a similar deduction from foreign market value as well. *Smith-Corona* and *Consumer Products* do not hold that adjustments to exporter's sales price under section 1677a(e)(2) are limited to indirect selling expenses. Those cases did not concern adjustments to exporter's sales price, but rather dealt solely with the propriety of adjustments to foreign market value.

Moreover, in both *Smith-Corona* and *Consumer Products*, consistent with its practice, Commerce had deducted direct selling expenses from exporter's sales price in calculating the antidumping margin. *See Consumer Prods.*, 753 F.2d at 1035, 3 Fed. Cir. (T) at 85 ("From [exporter's sales price], pursuant to 19 U.S.C. § 1677a(e)(2), all expenses of [merchandise] sales in the U.S., both direct and indirect, have been deducted to arrive at the U.S. price used for comparison purposes.").[12] Therefore, because this court expressly recognized that Commerce deducted *all* selling expenses from the exporter's sales price in calculating the antidumping margin, it would be patently inconsistent to interpret the above-noted language in *Consumer Products* as standing for the proposition that adjustments to exporter's sales price under section 1677a(e)(2) are limited to indirect selling expenses. The CIT has erred to the extent that it has interpreted *Smith-Corona* and *Consumer Products* as imposing such a limitation.

Finally, the longstanding status of Commerce's practice provides a further rationale for deferring to the agency's interpretation. *See Zenith Radio Corp.*, 437 U.S. at 457–58. As noted above, Treasury, the authority administering the antidumping law under the 1921 Act, deducted both indirect and direct selling expenses from exporter's sales price, and continued to do so even after the 1958 Act went into effect.[13] In 1979 the Antidumping Act was recodified by, *inter alia*, incorporating the relevant language of the 1921 Act—*i.e.*, requiring that exporter's sales price be reduced by "expenses generally incurred * * * in selling (the] merchandise." 19 U.S.C § 1677a(e)(2) (1988). It is safe to assume that Congress was aware of Treasury's practice when it stated that the recodification "would generally continue existing law with respect to the meaning of purchase price and exporter's sales price." S. Rep. at 94, 1979 U.S.C.C.A.N at 480. We believe this statement is an implicit approval of Treasury's, and now Commerce's, interpretation of the adjustment provisions at issue.

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[12] *See also Portable Electric Typewriters From Japan*, 45 Fed. Reg. 53853, 53854–55 (Dep't Comm. 1980)(antidumping duty determination). In this Commerce ruling which was ultimately affirmed in *Smith-Corona*, Commerce clearly stated that it was adjusting exporter's sales price for certain direct selling expenses (*e.g.*, U.S. advertising and commissions).

[13] *See, e.g., Portable Typewriters From West Germany*, 26 Fed. Reg. 1,413 (Dep't Treas. 1961); *Peat Moss From Canada*, 29 Fed. Reg. 439 (Dep't Treas. 1964); *Television Receiving Sets, Monochrome and Color, Front Japan*, 35 Fed. Reg. 18,549 (Dep't Treas. 1970); *Regenerative Blower/Pumps From West Germany*, 39 Fed. Reg. 7,188 (Dep't Treas. 1974); *Railway Track Maintenance Equipment From Austria*, 42 Fed. Reg. 41,339 (Dep't Treas. 1977); *Titanium Dioxide From Belgium*, 44 Fed. Reg. 47,198 (Dep't Treas. 1979).

CONCLUSION

Nothing in the plain language or the legislative history of the Antidumping Act precludes Commerce's approach of adjusting exporter's sales price by deducting therefrom certain direct selling expenses incurred in the United States. Indeed, Commerce's stated rationale for its approach is well within the bounds of reasonableness. Moreover, because we recognize that Commerce is "the 'master' of the antidumping law, worthy of considerable deference," *Daewoo Elecs.*, 6 F.3d at 1516, we defer to its approach. Accordingly, the judgment of the Court of International Trade is reversed and the case is remanded for recalculation of exporter's sales price and foreign market value in a manner consistent with this opinion.

COSTS

Each party shall bear its own costs.

REVERSED AND REMANDED WITH INSTRUCTIONS

NEW ZEALAND LAMB CO., INC., PLAINTIFF-APPELLEE *v.* UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 93–1237

(Decided November 14, 1995)

Edward J. Farrell, Bronz & Farrell, of Washington, DC, argued for plaintiff-appellee. *Susan Burnett Mansfield*, Senior Trial Counsel, Department of Justice, of New York, New York, argued for defendant-appellant. With her on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office

Appealed from: U.S. Court of International Trade.
Judge MUSGRAVE.

Before RICH, MAYER, and SCHALL, *Circuit Judges*.

SCHALL, *Circuit Judge*.

The United States appeals from the judgment of the United States Court of International Trade, *New Zealand Lamb Co. v. United States*, 16 CIT 1039 (1992), which granted the motion of New Zealand Lamb Company, Inc., for judgment on the pleadings and which ordered that the United States Customs Service (Customs) refund certain interest payments made under protest by New Zealand Lamb. The Court of International Trade held that because liquidation notices regarding certain entries of New Zealand Lamb made no mention of interest for increased countervailing duties, the entries were liquidated without interest. The court further held that because Customs did not act within

ninety days of the liquidations to reliquidate the entries and to assess the interest allegedly owed, the liquidations without interest were final and conclusive upon the government. Because we hold that the liquidations in this case did not trigger the running of the ninety-day statutory limitations period with respect to interest, we vacate and remand

BACKGROUND

I. FACTS OF THE CASE

This appeal relates to New Zealand Lamb's importation of lamb meat from New Zealand, which merchandise was the subject of a countervailing duty order.[1] In particular, the appeal concerns eight separate entries made by New Zealand Lamb for the imported merchandise.[2] For each of the eight entries, New Zealand Lamb made a deposit with Customs of estimated duties.[3] In addition to an amount for estimated regular importation duties, the deposit included an amount for estimated countervailing duties. Some time later, when Customs liquidated the entries (i.e., when Customs made its final computation of the amount of duties actually owing), it was determined that countervailing duties were owed in an amount greater than what was already on deposit.[4] After making this determination, Customs marked the eight entries as liquidated for increased duties. For six of the entries, the date of liquidation was December 15, 1989; for the other two, December 22, 1989. Customs posted bulletin notices to give public notice of the liquidations.[5] The bulletin notices, which are not in the record before us, apparently made no reference to interest. In addition, in that the parties do not refer us to the entry documentation, we assume that it too makes no reference to interest.

Following the liquidations, New Zealand Lamb paid the additional countervailing duties but did not volunteer payment to Customs for interest on the additional duties. Customs, however, being of the view that such interest was owing under 19 U.S.C. § 1677g (1988), billed New Zealand Lamb for the interest on March 23, 1990. This billing came ninety-nine days after the six December 15, 1989 liquidations and ninety-two days after the two December 22, 1989 liquidations. New Zealand Lamb paid the interest under protest. Subsequently, on June 21, 1990 (exactly ninety days after it was billed for the interest), it filed a protest with Customs (number 2704–0–002728) pursuant to 19 U.S.C. § 1514.

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[1] A countervailing duty is imposed, in certain circumstances, upon merchandise subsidized by a foreign country or entity. 19 U.S.C. § 1671 (1988).

[2] "Entry" is made by filing with Customs documentation enabling Customs, among other things, to make a proper assessment of duties on the merchandise. 19 U.S.C. § 1484(a)(1) (Supp. V 1993).

[3] A deposit is required before imported merchandise will be released by Customs. 19 U.S.C. § 1484(c) (Supp. V 1993); 19 C.F.R. § 141.101 (1994). The deposit serves as a security that the government will be paid the required duties when they are finally determined. 19 C.F.R. § 141.103 (1994).

[4] This final computation was made by Customs pursuant to 19 U.S.C. § 1500 (Supp. V 1993), which sets forth the appraisement, classification, and liquidation tasks that Customs shall perform.

[5] Statute requires that Customs "give * * * notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall by regulation prescribe." 19 U.S.C. § 1500(e). The pertinent regulation requires only that Customs post a bulletin notice "in a conspicuous place in the customhouse at the port of entry * * *." 19 C.F.R. § 159.9(b) (1994). The regulation does not require Customs to directly notify interested parties by mail or otherwise. *See id.*

In its protest, New Zealand Lamb challenged its liability for interest. Customs denied the protest, whereupon New Zealand Lamb commenced an action in the Court of International Trade.[6]

II. Proceedings in the Court of International Trade

In the Court of International Trade, New Zealand Lamb alleged that Customs had refused to accept the full amount offered in deposit for countervailing duties at the time of entry. From that, it claimed that it was not liable for interest because the underpayment of duties at the time of deposit was the result of Customs's error, the error being Customs's refusal to accept the proffered full amount of duties in deposit. In other words, New Zealand Lamb asserted that it was not required to pay interest on increased duties where the initial underpayment of duties was created by Customs's error. The government moved, pursuant to Rule 12(c) of the Rules of the Court of International Trade, to dismiss with prejudice New Zealand Lamb's action.[7] The government contended that the protest regarding interest was untimely because it was not filed with Customs within ninety days of the liquidations, as required by § 1514. The government argued that under § 1677g interest is required to be assessed on increased countervailing duties and that therefore the liquidations for increased countervailing duties necessarily amounted to decisions that interest on the increased duties was owing, which decisions New Zealand Lamb did not protest within ninety days. Relying on the bulletin notices' failure to mention interest, New Zealand Lamb responded that the liquidations correctly decided that it owed no interest. New Zealand Lamb thus cross-moved for judgment on the pleadings, arguing that Customs's March 23, 1990 billing for interest was an attempted reliquidation to assess interest, and that the reliquidation attempt was untimely under § 1514 because it was not made within ninety days of the liquidations.

On December 8, 1992, the Court of International Trade issued its decision denying the government's motion and granting New Zealand Lamb's. 16 CIT at 1040. The court first determined that, because interest on increased countervailing duties is "due incident to liquidation,1, the limitations period of § 1514 started to run upon the liquidations. *Id.* at 1041. Next, the court reasoned that, because the bulletin notices made no mention of interest, the entries were liquidated without interest. *Id.* Finally, the court concluded that the liquidations without interest were final and conclusive upon the government because Customs did not reliquidate the entries and assess interest within ninety days of the liquidations. *Id.* at 1042. The court thus ordered Customs to refund to New Zealand Lamb the interest paid under protest, with interest. *Id.* The government now appeals.

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[6] A protesting party has the right to file a civil action contesting the denial of a protest. 19 U.S.C. § 1514 (a) (Supp. V 1993). The Court of International Trade has exclusive jurisdiction over such actions. 28 U.S.C. § 1581(a) (1988).

[7] Rule 12(c) of the Court of International Trade, regarding judgments on the pleadings, is identical to Rule 12(c) of the Federal Rules of Civil Procedure.

DISCUSSION

I. STANDARD OF REVIEW

Judgment on the pleadings for a plaintiff is appropriate where there are no material facts in dispute and the plaintiff is entitled to judgment as a matter of law. *See General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990). Such a judgment is reviewed *de novo*. *Id.*

II. ANALYSIS

Our analysis of whether the Court of International Trade properly granted judgment in favor of New Zealand Lamb begins with the limitations provision that was in effect for the entries at issue. That provision provides in pertinent part as follows:

> **§ 1514 Protests against decisions of appropriate customs officers.**
>
> **(a) Finality of decisions; return of papers**
>
> [Except in situations not relevant to the present case], decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> * * * * * * *
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
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> * * * * * * *
>
> (5) the liquidation or reliquidation of an entry, or any modification thereof;
>
> * * * * * * *
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title.
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> * * * * * * *
>
> **(c) Form, number, and amendment of protest; filing of protest**
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> * * * * * * *
>
> (2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—
>
> (A) notice of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. § 1514 (1988); see also amended current version at 19 U.S.C. § 1514 (1988 & Supp. V 1993).[8]

In accordance with § 1514(a) and (c), an importer's right to both administrative and judicial review of certain categories of Customs decisions—namely, those enumerated in subsection (a)—rests upon the filing of a protest with Customs within ninety days of such a decision. Likewise, such a decision becomes final and conclusive upon the government in accordance with § 1514(a) unless the government acts to revise the decision within ninety days.[9] Thus, § 1514 contains a limitations provision that operates against both importers and the government.

The relevant interest statute, 19 U.S.C. § 1677g, provides in pertinent part as follows:

> **§ 1677g Interest on certain overpayments and underpayments.**
>
> **(a) General rule**
>
> Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—
>
> (1) the date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title * * *.

19 U.S.C. § 1677g(a) (1988).

The issue that we must address is when, if ever, the § 1514 limitations period began to run in this case. The government argues that, by operation of § 1677g, the liquidations for increased countervailing duties amounted to assessments of interest, irrespective of whether interest was mentioned in the bulletin notices. Accordingly, the government maintains, because New Zealand Lamb's protest was not filed within ninety days of the liquidations, under § 1514(a) the assessments of interest became final and conclusive against the importer. Alternatively, the government urges us to hold that New Zealand Lambs period to file a protest began when it was billed for interest. Under this approach, the government concedes that New Zealand Lamb's protest was timely filed and that the Court of International Trade possessed jurisdiction to consider the merits of the case. For its part, New Zealand Lamb argues that Customs's failure to make a formal assessment of interest at the time of the liquidations or within ninety days of the liquidations precluded it from thereafter doing so.

For the reasons which follow we conclude that there was no decision regarding interest—so as to trigger the running of the ninety-day limitations period—until Customs actually billed New Zealand Lamb for interest on March 23, 1990. Accordingly, we hold that neither Cus-

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[8] Various amendments were made to § 1514 on December 8, 1993. *See* Pub. L. 103-182, tit. II, § 208, tit. IV, § 412(a), tit. VI, § 645, 107 Stat. 2097, 2146, 2206. For the time relevant to the entries in this case, however, these amendments were not yet in effect. Our analysis below is based upon the version of the statute that was in effect during the relevant time period—the version that appears in the 1988 United States Code. In any event, we note that the 1993 amendments to § 1514 are not relevant to the issue in this case.

[9] This accords with 19 U.S.C. § 1501 (1988), which provides that "[a] liquidation * * * may be reliquidated in any respect by the appropriate customs officer on his own initiative * * * within ninety days from the date on which notice of the original liquidation is given to the importer, his consignee or agent." amended current version at 19 U.S.C. § 1501 (Supp. V 1993).

toms's billing nor New Zealand Lamb's protest of that billing was untimely. We thus agree with the government's alternative argument.

As just seen, the government contends that, by operation of § 1677g, the liquidations for increased countervailing duties amounted to assessments of interest so as to start the running of the § 1514 limitations period against New Zealand Lamb. In making this argument, the government focuses on the words "interest shall be payable" in § 1677g(a) and asserts that they mean the payment of interest is required as a matter of law once an increased countervailing duty is assessed. As a result, according to the government, in order to start the limitations period running, it was not necessary for Customs to make a formal assessment of interest against New Zealand Lamb by sending it a bill for the interest. We disagree.

In *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989), we stated that

> [p]rior to the enactment of the Trade Agreements Act of 1979, interest on underpayments or overpayments was not required by law. Pursuant to the Act, 19 U.S.C. § 1677g (1982), interest is imposed on any underpayment or overpayment of estimated duties deposited for merchandise entered for consumption on or after publication of the final injury determination by the United States International Trade Commission.

We express no views (i) on whether Customs erred by refusing to accept the correct full amount of countervailing duties when offered in deposit and (ii) on whether, if Customs did so err, the result was that New Zealand Lamb was not required to pay interest on the resulting underpayment. Those are the issues which lie at the heart of New Zealand Lamb's protest and which should be decided in the first instance by the trial court. What we do conclude is that there was no decision regarding interest for purposes of starting the running of the § 1514 limitations period until Customs expressly informed New Zealand Lamb that interest was due. We so hold because we do not believe that there is a decision regarding interest for purposes of starting the running of the limitations period until Customs (i) informs the importer that interest is due and (ii) sets forth either the amount of interest that is due or the method of calculating that amount in terms of the rate.

We start from the premise that interest on the underpayment of duties is a charge "within the jurisdiction of the Secretary of the Treasury," 19 U.S.C. § 1514(a)(3). *See Syva Co. v. United States*, 681 F. Supp. 885, 888 (Ct. Int'l Trade 1988) (holding that interest is properly considered a charge within the meaning of 28 U.S.C. § 2637(a) (1982)). We do not see how there can be a decision on a charge—at least for purposes of starting the running of a limitations period—until the party levying the charge announces that the charge is being levied and states the amount of the charge, or the method of computing the charge. In the case of interest that means there is no decision until the party being assessed either is informed of the amount of interest that is due or is told what the

rate of interest to be applied against the principal amount is.[10] Until this is done, the party assessed is not informed of all elements of the charge: liability and quantum, either or both of which it may wish to protest. Therefore, the liquidations in this case, which made no mention of interest, were not decisions regarding interest for purposes of starting the running of the § 1514 limitations period against New Zealand Lamb. Such a decision did not-come until March 23, 1990, when Customs billed New Zealand Lamb for the interest.[11] That decision, by virtue of § 1514(c)(2)(B), commenced the running of the ninety-day limitations period.[12] Consequently, New Zealand Lamb's protest was filed with Customs ninety days after the date of the interest decision and was therefore within the time limitation of § 1514. Turning to New Zealand Lambs argument that Customs's failure to assess interest at the time of the liquidations or within ninety days of the liquidations precluded it from thereafter doing so, we know of nothing in the Customs statutes, or in the implementing regulations, that prevents Customs from making a decision regarding interest separate from, and subsequent to, a liquidation. In fact, the Court of International Trade has held that a decision regarding interest which was due incident to a reliquidation was not a part of, and was separate from, the reliquidation decision. *Dornier Medical Sys., Inc. v. United States,* 747 F. Supp. 753, 755 (Ct Int'l Trade 1990) ("Barring a statement by Customs in the reliquidation decision that it did not intend to pay interest on the refund, the payment or nonpayment of interest by the Government was subsequent to, and not part of, the decision on reliquidation."). The Court of International Trade erred in concluding that the failure of Customs to charge New Zealand Lamb interest at the time of the liquidations meant that "the entries were liquidated without interest," *New Zealand Lamb Co.,* 16 CIT at 1041. Thus, there was no "liquidation of the entries without interest [that] became final and conclusive upon the United States," *id.* at 1042.

CONCLUSION

The limitations provision contained in § 1514 did not operate against either New Zealand Lamb or the government in this case. Accordingly, the judgment of the Court of International Trade is vacated, and the case is remanded for consideration of the merits of New Zealand Lamb's protest.

COSTS

Each party shall bear its own costs.

VACATED AND REMANDED

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[10] In its present form, § 1677g provides that "[t]he rate of interest payable under subsection (a) of this section for any period of time is the rate of interest established under section 6621 of Title 26 for such period." 19 U.S.C. § 1677g(b) (1988). This is the version of the statute that was in effect at the time relevant to this case.

[11] We understand that the billing did not specify the amount of interest that New Zealand Lamb owed. However, the amount of interest—as opposed to liability therefor—is not in dispute in this case.

[12] As seen above, under § 1514(c)(2), where the decision being protested is not a liquidation or reliquidation decision, the ninety-day limitations period begins to run at the date of the decision. In this case, that is the date of the charge or exaction for interest.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–156)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 92–06–00423

Plaintiffs challenge certain aspects of the final determination of the United States Department of Commerce, International Trade Administration ("Commerce"), in *Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 57 Fed. Reg. 28,360 (1992). Plaintiffs allege that Commerce improperly: (1) deducted direct selling expenses incurred on U.S. sales from the exporter's sales price instead of adding such expenses to the foreign market value ("FMV"); (2) recalculated plaintiffs' reported credit expense to eliminate the effect of compensating deposits; (3) included plaintiffs' sample sales and other sales allegedly made outside the ordinary course of trade in the calculation of FMV; and (4) matched U.S. sales with home market sales at different levels of trade and failed to make a level of trade adjustment reflecting the full difference in price between trade levels.

This action is before the Court on plaintiffs' motion for judgment upon the agency record pursuant to Rule 56.2 of the Rules of the Court.

Held: Plaintiffs' motion is granted to the extent that this case is remanded to Commerce to explain its methodology and rationale for recalculating plaintiffs' credit costs. If Commerce substantiates its rejection of plaintiffs' claimed adjustment relating to compensating deposits, Commerce is to recalculate plaintiffs' credit expense to fully exclude the impact of compensating deposits. In addition, Commerce is to explain its basis for rejecting plaintiffs' claim for a level of trade adjustment related to price differences.

[Plaintiffs' motion is granted in part and denied in part; case remanded.]

(Dated September 6, 1995)

Barnes, Richardson & Colburn (Donald J. Unger, Robert E. Burke, Kazumune V. Kano and *Diane A. MacDonald)* for plaintiffs NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine)*; of counsel: *Stephen J. Claeys, Stacy J. Ettinger, Thomas H. Fine, Alicia Greenidge, Dean A. Pinkert* and *Craig R. Giesze*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel, Joseph A. Perna, V and *J. Eric Nissley)* for defendant-intervenor, Federal-Mogul Corporation.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Robert A. Weaver, John M. Breen and *William A. Fennell)* for defendant-intervenor, The Torrington Company.

OPINION

TSOUCALAS, *Judge:* This case arises from the final administrative review determination of the International Trade Administration, United States Department of Commerce ("Commerce"), regarding ball bearings, cylindrical roller bearings and spherical plain bearings (collectively "antifriction bearings" or "AFBs") and parts thereof from Japan. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews (Final Results),* 57 Fed. Reg. 28,360 (1992). Plaintiffs NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation (collectively "NTN") are manufacturers, exporters and/or importers of AFBs subject to the contested determination.

This action is before the Court on NTN's motion for judgment upon the agency record pursuant to Rule 56.2 of the Rules of this Court.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on antifriction bearings and parts thereof from Japan, Germany, France, Italy, Romania, Singapore, Sweden, Thailand and the United Kingdom. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan,* 54 Fed. Reg. 20,904 (1989).[1]

On June 28, July 19 and August 14, 1991, Commerce initiated administrative reviews of those orders with respect to sixty-three manufacturers and exporters, including NTN, for the period May 1, 1990 through April 30, 1991. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews,* 56 Fed. Reg. 29,618 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 56 Fed. Reg. 33,251 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 56 Fed. Reg. 40,305 (1991).

On March 31, 1992, Commerce issued its preliminary determinations in these second administrative reviews. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan;*

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[1] *See also Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 20,900 (1989); 54 Fed. Reg. 20,902 (France); 54 Fed. Reg. 20,903 (Italy); *Antidumping Duty Order: Ball Bearings and Parts Thereof From Romania,* 54 Fed. Reg. 20,906 (1989); *Antidumping Duty Order of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Singapore,* 54 Fed. Reg. 20,907 (1989); *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Parts Thereof From Sweden,* 54 Fed. Reg. 20,907 (1989); *Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Thailand,* 54 Fed. Reg. 20,909 (1989); *Antidumping Duty Orders and Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom,* 54 Fed. Reg. 20,910 (1989).

Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 57 Fed. Reg. 10,868 (1992).[2]

On June 24, 1992, Commerce published one joint final determination for the nine administrative reviews. *See Final Results,* 57 Fed. Reg. at 28,360.

Against this background, NTN now moves pursuant to Rule 56.2 of the Rules of the Court for judgment upon the agency record with respect to certain aspects of the Final Results. In particular, NTN objects to the following actions by Commerce with respect to Japan: (1) deduction of direct selling expenses incurred on U.S. sales from the exporter's sales price instead of adding such expenses to the foreign market value ("FMV"); (2) recalculation of NTN's reported credit expense to eliminate the effect of compensating deposits; (3) inclusion of NTN's sample sales and other sales allegedly made outside the ordinary course of trade in calculating FMV; and (4) matching of U.S. sales with home market sales at different levels of trade and failing to make a level of trade adjustment reflecting the full difference in price between trade levels. *NTN's Motion for Judgment on the Agency Record and Memorandum in Support Thereof ("NTN's Brief")* at 1–26.[3]

NTN asserts that these alleged errors render the Final Results unsupported by substantial evidence and contrary to law. *NTN's Brief* at 2–4.

On August 5, 1992, the Court granted NTN's motion for a preliminary injunction enjoining the liquidation of NTN's unliquidated entries of subject AFBs from Japan during the pendency of this litigation in the United States Court of International Trade.

Defendant-intervenors Federal-Mogul Corporation ("Federal-Mogul"), a manufacturer in the United States of AFBs, and The Torrington Company ("Torrington"), the petitioner in the original investigation, oppose NTN's challenge. On September 24, 1992, and October 23, 1992, respectively, the Court granted Federal-Mogul's and Torrington's motions to intervene as defendants in this civil action.

Discussion

The Court's jurisdiction in this action is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

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[2] *See also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 57 Fed. Reg. 10,859 (1992); 57 Fed. Reg. 10,862 (Federal Republic of Germany); 57 Fed. Reg. 10,865 (Italy); 57 Fed. Reg. 10,875 (Sweden); 57 Fed. Reg. 10,878 (United Kingdom); *Ball Bearings and Parts Thereof From Romania; Preliminary Results Antidumping Duty Administrative Review,* 57 Fed. Reg. 10,871 (1992); 57 Fed. Reg. 10,873 (Singapore); *Ball Bearings and Parts From Thailand; Preliminary Results of Antidumping Duty Administrative Review and Partial Termination of Administrative Review,* 57 Fed. Reg. 10,877 (1992).

[3] Plaintiffs abandoned two of the eight counts in their complaint and combined counts to yield four issues for the Court's consideration. *See NTN's Brief* at 1 n.1, 1–4.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

1. *NTN's Direct Selling Expenses:*

In accordance with its long-standing administrative practice, Commerce deducted NTN's direct selling expenses incurred on U.S. sales of antifriction bearings from the exporter's sales price ("ESP") pursuant to 19 U.S.C. § 1677a(e)(2) (1988).[4]

NTN argues that Commerce should have added those expenses to the foreign market value as a "circumstance-of-sale" adjustment pursuant to 19 U.S.C. § 1677b(a)(4)(B) (1988). *NTN's Brief* at 8–11. According to NTN, judicial precedent supports its position. *Id.* at 8–9 (citing to *NTN Bearing Corp. of Am. v. United States,* 17 CIT ___, Slip Op. 93–56 (April 21, 1993), and other cases). NTN asserts that, pursuant to 19 U.S.C. § 1677b(a)(4), Commerce must treat direct selling expenses, whether attributable to home market or United States sales, as a circumstance of sale adjustment. *Id.* at 9–11.

Commerce concedes that the Court has previously held that 19 U.S.C. § 1677a(e) only covers indirect selling expenses and any adjustment for direct selling expenses must be made to FMV pursuant to 19 U.S.C. § 1677b(a)(4). *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Brief")* at 6. However, Commerce argues that it has interpreted the language "expenses generally incurred by * * * the exporter in the United States" in § 1677a(e)(2) as encompassing direct and indirect selling expenses related to U.S. sales. *Defendant's Brief* at 6. In addition, Commerce argues that 19 U.S.C. § 1677b(a)(4) does not specifically address direct selling expenses incurred in ESP transactions. *Id.* Commerce elaborates contending that

> [b]ecause the entered value does not include any selling expenses incurred by or for the account of the 'exporter in the United states' *(i.e.,* the U.S. related party), the adjustment for all such expenses (direct and indirect) from the ESP is necessary to produce accurate deposit rates and assessment rates as well as to conform to the congressional intent that FMV be compared to an f.o.b. origin value.

Id. at 8.

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[4] **§ 1677a. United States price**

(e) Additional adjustments to exporter's sales price

* * * [T]he exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

* * * * * * *

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise.

19 U.S.C. § 1677a(e)(2).

Federal-Mogul essentially supports Commerce on this issue. *See Opposition of Federal-Mogul Corporation, Defendant-Intervenor, to NTN's Motion for Judgment on the Agency Record ("Federal-Mogul's Brief")* at 5–11. It is Torrington's position that a remand on this issue would be impractical as only the estimated duty deposit rate would be affected. *See Memorandum of The Torrington Company in Opposition to Motion for Judgment on the Agency Record ("Torrington's Brief")* at 24.

This issue is governed by *Koyo Seiko Co. v. United States*, 36 F.3d 1565 (Fed. Cir. 1994). In *Koyo Seiko*, the Court of Appeals for the Federal Circuit ("CAFC") found that the plain language of the statute is not dispositive on this question. *Koyo Seiko*, 36 F.3d at 1571. Guided by the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), the CAFC also concluded that neither the statute nor its legislative history evince Congress' "unambiguously expressed intent" with regard to the precise question at issue. *Koyo Seiko*, 36 F.3d at 1571–73 (quoting *Chevron*, 467 U.S. at 843.) Therefore, the court scrutinized the reasonableness of the agency's statutory interpretation. *Koyo Seiko*, 36 F.3d at 1573–75. The CAFC concluded that Commerce's treatment of U.S. direct expenses "evidences an attempt to make mirror-image adjustments to foreign market value and exporter's sales price so that they can be fairly compared at the same point in the chain of commerce." 36 F.3d at 1573. Finding Commerce's interpretation of the statute to be reasonable, the court deferred to Commerce's interpretation of its own statute. *Koyo Seiko*, 36 F.3d at 1575. *See also Koyo Seiko Co. v. United States*, 19 CIT ____, ____, Slip Op. 95–146 at 16–17 (Aug. 16, 1995); *NSK Ltd. v. United States*, 19 CIT ____, ____, Slip Op. 95–138 at 34–35 (Aug. 1, 1995).

As Commerce is not precluded from adjusting ESP by deducting therefrom certain direct selling expenses incurred in the United States, the Court affirms Commerce's treatment of NTN's U.S. direct selling expenses as supported by substantial evidence on the record and in accordance with law.

2. *Calculation of NTN's Home Market Credit Expense:*

In this review, NTN's reported home market credit expense included an adjustment for compensating deposits.[5] Torrington protested that NTN's home market credit expense was inflated by the inclusion of compensating deposits. *Final Results*, 57 Fed. Reg. at 28,406. Commerce agreed with Torrington and recalculated NTN's credit costs "based on the firm's net interest expense (interest expense minus interest income) as most representative of the firm's internal cost of funds." *Id.*

NTN claims that compensating deposits were a factor affecting its net credit costs and that Commerce erred in not considering compensating deposits in calculating its interest rate. *NTN's Brief* at 11–13. NTN

[5] Compensating deposits, or balances, are bank deposits held as security for outstanding loans. Many banks require that a borrower maintain an average account balance equal to a percentage of the outstanding loan. This raises the real or effective interest rate of the loan. *See NTN Bearing Corp. of Am. v. United States*, 835 F. Supp. 646, 651 (1993). *See also Timken Co. v. United States*, 16 CIT 999, 1003, 809 F. Supp. 121, 124 (1992); *PPG Indus. Inc. v. United States*, 14 CIT 522, 526 n.8, 746 F. Supp. 119, 124 n.8 (1990).

argues that its financial records substantiate its credit cost calculations and that the final determination fails to explain why Commerce rejected NTN's actual costs and why the recalculated rate is more accurate than the rate derived by NTN. *Id.* at 12–13.

NTN also argues that, assuming that Commerce properly rejected its claim pertaining to compensating deposits, Commerce's methodology was nevertheless flawed. Specifically, NTN claims that—in disregarding NTN's claimed adjustment—Commerce should have calculated NTN's home market credit expense based on its nominal interest rate. *Id.* at 13–14.

Commerce asserts that NTN failed to demonstrate that its compensating deposits were a prerequisite for any of its bank loans. *Defendant's Brief* at 12. In addition, Commerce requests a remand in order to recalculate NTN's credit costs to fully exclude the impact of compensating balances from NTN's costs calculations. *Id.* at 14.

Torrington asserts that Commerce properly based NTN's credit costs on the effective borrowing rate net of interest earned from compensating balances because NTN failed to substantiate its home market credit expense methodology. *Torrington's Brief* at 6–9.

An administrative agency, generally, must cite the reasons for its decision in order that the reviewing court may ascertain whether the agency has acted arbitrarily. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974). *See also Nachi-Fujikoshi Corp. v. United States*, 16 CIT 606, 609, 798 F. Supp. 716, 719 (1992). A court may, however, uphold an agency's decision of less than ideal clarity if the agency's path is reasonably discernible. *Nachi-Fujikoshi Corp.*, 16 CIT at 609, 798 F. Supp. at 719 (quoting *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (citation omitted)). In *NTN Bearing Corp. of Am. v. United States*, 19 CIT ____, 881 F. Supp. 595 (1995), the Court reviewed Commerce's final determination issued in *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 4,960, 4,968 (1992). In that review, Commerce had recalculated NTN's reported credit expense because NTN had provided "inadequate justification" for its credit cost calculation based on compensating deposits. The Court, however, found that Commerce had inadequately explained the manner in which it calculated the deposit rate and the reasons for not using NTN's nominal interest rate. *NTN Bearing Corp.*, 19 CIT at ____, 881 F. Supp. at 603. In the present case, the Final Results provide no explanation whatsoever for Commerce's decision to recalculate NTN's reported credit expense beyond expressing agreement with Torrington that NTN's calculation should be rejected in light of the inclusion of compensating deposits.

As the Final Results do not adequately convey Commerce's basis for recalculating NTN's credit costs, the Court remands this case to Commerce to explain its methodology and rationale. *See Id.* at ____, 881 F. Supp. at 603. *See also NTN Bearing Corp. v. United States*, 18 CIT ____,

____, 881 F. Supp. 584, 593 (1994); *NTN Bearing Corp. v. United States*, 18 CIT ____, ____, 858 F. Supp. 215, 222 (1994). If Commerce substantiates its rejection of NTN's claimed adjustment related to compensating deposits, Commerce should recalculate NTN's credit expense to fully exclude the impact of the compensating deposits.

3. *Ordinary Course of Trade:*

In its reporting of home market sales, NTN's data earmarked for exclusion from Commerce's calculations, certain sales as made outside the ordinary course of trade. The coded sales included sample sales, sales with a zero price and sales where the total quantity of a particular bearing was five or fewer per month. *NTN's Brief* at 14–15. Commerce disregarded NTN's coding and included these sales when calculating FMV because NTN provided "insufficient evidence * * * to substantiate its claim that sales of sample and small quantities constitute sales made outside the ordinary course of trade." *Final Results*, 57 Fed. Reg. at 28,395.

NTN argues that, pursuant to 19 U.S.C. § 1677b(a)(1) (1988),[6] Commerce should have deleted the coded sample and small quantity sales from the home market database prior to calculating weighted average prices for FMV. *NTN's Brief* at 15.

NTN asserts that it is the intent of the parties to the transaction which is the overriding factor in determining whether sales are sample sales. *Id.* at 16. To substantiate that the contested sample and small quantity sales were made outside the ordinary course of trade, NTN relies on the certification of factual accuracy of its reporting. *Id.* at 16. In addition, NTN argues that because Commerce excluded sample sales and other sales identified by NTN as not in the ordinary course of trade in another proceeding, it should have done so in the instant case as well. *NTN's Brief* at 15, 17 (citing *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 4,951, 4,959 (1992)).

In rebuttal, Commerce argues that NTN's bare allegation that its sales are what NTN proports them to be is insufficient to overcome the paucity of record evidence in this case. *Defendant's Brief* at 15.

As an initial matter, the Court notes that Commerce's treatment of sales in another proceeding is irrelevant to this case. The Court has stated that "Commerce's determinations must be examined on an indi-

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[6] According to 19 U.S.C. § 1677b(a)(1):

> The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person * * *
>
> (A) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the *usual commercial quantities* and in the *ordinary course of trade* for home consumption * * *.

19 U.S.C. § 1677b(a)(1)(A) (emphasis added).

Ordinary course of trade is defined as:

> the conditions and practices which, for a reasonable time prior to the exportation of the merchandise which is the subject of an investigation, have been normal in the trade under consideration with respect to merchandise of the same class or kind.

19 U.S.C. § 1677(15) (1988).

vidual basis taking into account all of the relevant facts of each case." *Nachi-Fujikoshi,* 16 CIT at 609, 798 F. Supp. at 719.

Moreover, "[d]etermining whether home market sales are in the ordinary course of trade requires evaluating not just 'one factor taken in isolation but rather * * * all the circumstances particular to the sales in question.'" *Cemex, S.A. v. United States,* 19 CIT ____, ____, Slip Op. 95–72 at 6 (Apr. 24, 1995) (citing *Murata Mfg. Co. v. United States,* 17 CIT ____, ____, 820 F. Supp. 603, 607 (1993) (quoting *Certain Welded Carbon Steel Standard Pipes and Tubes From India, Final Results of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 64,753, 64,755 (1991)).

The Court has recognized that the plaintiff bears the burden of proving whether the sales used in Commerce's calculations are outside the ordinary course of trade. *See Nachi-Fujikoshi,* 16 CIT at 608, 798 F. Supp. at 718. Furthermore, the "certification" requirement of 19 C.F.R. § 353.31 (1992) does not displace substantive burdens of proof which remain with the party who has access to the information. *Indus. Fasteners Group, Am. Importers Ass'n v. United States,* 710 F.2d 1576, 1582 n.10 (Fed. Cir. 1983). In this case, the administrative record contains little more than an allegation by NTN that the contested sales were made outside the ordinary course of trade.[7] *See* Japan P.R. Document No. 307, Frames 327, 342. Therefore, NTN has failed to establish entitlement to the claimed exclusion from Commerce's calculation.

As NTN has failed to carry its burden of proof on this question, the Court sustains Commerce's inclusion of the contested sales in its calculation of FMV as reasonable and in accordance with law. *See Timken Co. v. United States,* 18 CIT ____, ____, 865 F. Supp. 850, 853 (1994). *See also Nachi-Fujikoshi,* 16 CIT at 608–09, 798 F. Supp. at 718–19.

4. *Comparison of Sales Across Different Levels of Trade and Level of Trade Adjustment:*

In this review, Commerce determined that NTN's sales were made at three levels of trade: original equipment manufacturers ("OEMs"), distributors and aftermarket. *Final Results,* 57 Fed. Reg. at 28,391. The Final Results stated:

> NTN argues that the Department should have either not crossed levels of trade, and then made comparisons to CV [constructed value], or should have made a level-of-trade adjustment when levels of trade were crossed. Such an adjustment should be based on, preferably, differences in selling prices at the different levels of trade, or else on the difference in indirect selling expenses.

Id. Commerce compared NTN's sales at the different levels of trade. *Id.,* 57 Fed. Reg. at 28,392 (citing to 19 C.F.R. § 353.58 (1992)). In addition, Commerce made a circumstance of sale adjustment for differences in indirect selling expenses at the identified trade levels, explaining: "NTN quantified indirect selling expenses incurred at different levels of

[7] The Japan public record of this administrative review is designated "P.R." The confidential record is designated "C.R."

trade. Therefore, in comparisons made across levels of trade, we have accepted the differences in these expenses as attributable to level-of-trade, and we have granted an adjustment accordingly." *Final Results*, 57 Fed. Reg. at 28,392.

NTN concedes that judicial precedent upholds Commerce's prerogative to match sales at different trade levels absent sales at the same level of trade. *NTN's Brief* at 18 (citing *Koyo Seiko Co. v. United States*, 17 CIT ___, 840 F. Supp. 136 (1993), *aff'd*, 20 F.3d 1156 (Fed. Cir 1994), and cases cited therein). However, NTN objects to Commerce's failure to grant, or explain its denial of, a circumstance of sale adjustment for differences affecting price comparability across levels of trade. *NTN's Brief* at 17–26.

It is NTN's position that an adjustment for indirect selling expenses between levels of trade alone does not achieve the regulatory purpose of 19 C.F.R. § 353.58 "to adjust 'for differences affecting *price* comparability' or the statutory mandate [of 19 U.S.C. § 1677b(a)(4)(B)] that 'due allowance be made * * *' for such differences." *Id.* at 19. NTN also maintains that the statute's legislative history clearly indicates that differences in level of trade were among the adjustments contemplated by 19 U.S.C. § 1677(b)(4). *NTN's Brief* at 19 (citing H.R. Rep. No. 317, 96th Cong., 1st Sess. 76 (1979)). NTN also asserts that circumstance of sale adjustments must be accurately made to effect fair comparisons. *NTN's Brief* at 18–19 (citing *Smith-Corona Group, Consumer Prods. Div., SCM Corp. v. United States*, 713 F.2d 1568 (1983), *cert. denied*, 465 U.S. 1022 (1984)).

NTN insists that the administrative record establishes its claimed price differentials across trade levels. *NTN's Brief* at 20 (citing to Japan C.R. Document No. 7, Reel 11, Frame 1, 18). Further, according to NTN, the fact that sales are made to different types of customers creates a rebuttable economic presumption that the levels of trade to which it sells have an impact on price and, ultimately, on fair market value. *NTN's Brief* at 20. NTN relies on *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 16 CIT 1008, 808 F. Supp. 841 (1992), *rev'd on other grounds*, 13 F.3d 398 (1994), for this proposition. NTN requests that the Court order Commerce to either not cross levels of trade when matching sales or that it make a level of trade adjustment to account for price differences in the three recognized levels of trade. *NTN's Brief* at 26.

To quantify its level of trade adjustment request, NTN provided Commerce with large percent ranges by which it claimed its selling prices differed. Japan C.R. Document No. 7, Reel 11, Frame 1, 18. Commerce maintains that NTN's request for a level of trade adjustment for price differences was deficient in several respects and did not support entitlement to the desired adjustment. *NTN's Brief* at 19–20.

In addition, Commerce asserts that its explanation in the Final Results that it had accepted NTN's "quantified" indirect selling expenses, implied that it had rejected NTN's claim concerning differ-

ences in selling price because that claim was not quantified. *Id.* at 22 (referring to *Final Results,* 57 Fed. Reg. at 28,392).

Title 19, United States Code, section 1675(a) (1988) requires Commerce to calculate the difference between the foreign market value and the United States price of the imported merchandise. Before calculating FMV, Commerce must first identify, for each U.S. sale, a comparison home market sale. If identical merchandise, as defined in 19 U.S.C. § 1677(16) is not available, Commerce must then proceed to select similar merchandise as defined in subsections (B) or (C) of 19 U.S.C. § 1677(16).

The Court has, on several occasions, affirmed Commerce's selection of most similar merchandise sold in the home market when alternative levels were unavailable. *See, e.g., NTN Bearing Corp.,* 18 CIT at ___, 881 F. Supp. at 590–91. *See also NTN Bearing Corp.,* 18 CIT at ___, 858 F. Supp. at 220–21; *Koyo Seiko Co.,* 17 CIT at ___, 840 F. Supp. at 139–40; *NTN Bearing Corp.,* 17 CIT at ___, 835 F. Supp. at 649. Thus Commerce's comparison of sales across different levels of trade was in accordance with law.

Commerce is required, under certain circumstances, to make adjustments to the United States price and to FMV in its price comparisons in order to accurately calculate dumping margins. 19 U.S.C. § 1677b(a)(4). Level-of-trade adjustments are governed by 19 C.F.R. § 353.58 which provides:

> The Secretary normally will calculate foreign market value and United States price based on sales at the same commercial level of trade. If sales at the same commercial level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate foreign market value based on sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise *and make appropriate adjustments for differences affecting price comparability.*

(Emphasis added.)

A party claiming a level-of-trade adjustment has the burden of proving entitlement to the adjustment. *See Fundicao Tupy, S.A. v. United States,* 12 CIT 6, 8, 678 F. Supp. 898, 899–900, *aff'd,* 859 F.2d 915 (Fed. Cir. 1988). Commerce "cannot adjust prices for level of trade differences in the absence of quantifying evidence to substantiate the request." *Hercules, Inc. v. United States,* 11 CIT 710, 750, 673 F. Supp. 454, 487 (1987).

In this case, NTN officially requested a circumstance of sale adjustment from Commerce for differences in prices between levels of trade. *See* Japan P.R. Document No. 656, Reel 8, Frame 2,118. NTN substantiated that it sold products at various levels of trade. *Id.* It is undisputed that NTN's Section C response at Exhibit C–4 demonstrated that NTN's indirect selling expenses varied with level of trade and that NTN quantified those variances. *See* Japan C.R. Document No. 63, Reel 15, Frame 756. In addition, NTN attempted to quantify differences in

prices between levels of trade. *See* Japan C.R. Document No. 7, Reel 11, Frame 1, 18.

Commerce contends that the Final Results address, by implication, its denial of NTN's requested adjustment for the full difference in selling price allegedly caused by differences in level of trade. The Court finds Commerce's explanation inadequate.

Counsel for Commerce suggests, *post hoc,* that the information which NTN submitted to support a level of trade adjustment for price differences was insufficient and precluded any further adjustment. First, Commerce claims that NTN failed to provide worksheets to demonstrate how its percent ranges were calculated. Second, Commerce maintains that although NTN claimed that the prices at one level of trade exceeded those at another by a range of percentages, NTN failed to explain what part of that large percent range Commerce should use. Third, Commerce asserts that while NTN compared the prices of various levels of trade to OEMs, it did not compare those levels to each other. Commerce claims that, consequently, it had no way of knowing what adjustment to make if two of those levels of trade were compared. In addition, Commerce contends that NTN provided no evidence to show that alleged differences in selling price between trade levels were actually caused by differences in levels of trade rather than by other factors such as volume discounts, selling expenses or actual dumping. Finally, Commerce contends that NTN failed to demonstrate that Commerce had not already accounted for any differences by way of other adjustments, such as the adjustment for differences in selling expenses. *Defendant's Brief* at 19–21.

The Court sees none of the foregoing concerns of counsel, legitimate as they might be, expressed by Commerce in the Final Results. Commerce's specific concerns bearing on the appropriateness of a level of trade adjustment for price differences, or its quantification, should have been articulated by Commerce in the Final Results. *Post hoc* rationalization, for which there is no expressed basis in the agency's determination under judicial review, cannot supply what is deficient in the Final Results. *See Sugiyama Chain Co. v. United States,* 19 CIT ____, ____, 880 F. Supp. 869, 874–75 (1995).

Therefore, to afford Commerce an additional opportunity to address the level of trade issue, the Court remands this case to Commerce for a full explanation of its rationale for rejecting NTN's request for a level of trade adjustment for price differences, thus eliminating the need for speculation as to the basis for Commerce's determination on this issue. *See Sugiyama,* 19 CIT at ____, 880 F. Supp. at 875; *NTN Bearing Corp.,* 18 CIT at ____, 858 F. Supp. at 221.

CONCLUSION

For the reasons stated herein, the Court remands this case to Commerce to explain its methodology and rationale for recalculating NTN's credit costs to eliminate the effect of compensating deposits. If Commerce substantiates its rejection of NTN's claimed adjustment, Com-

merce should recalculate NTN's credit expense to fully exclude the impact of compensating deposits. In addition, Commerce is to fully explain its rationale for rejecting NTN's request for a level of trade adjustment for differences in selling prices at the identified levels of trade. Commerce's Final Results are sustained in all other respects.

The remand results are due within ninety (90) days of the date that this opinion is entered. Any comments or responses by the parties to the remand results are due within thirty (30) days thereafter; any rebuttal comments are due within fifteen (15) days of the date that responses or comments are due.

NOTE: Pursuant to the court's Procedures for Publication of Opinions and Orders, the court's unpublished order entered on September 11, 1995 is being published by the Clerk's Office as Slip Op. 95–157 on September 11, 1995.

(Slip Op. 95–157)

FORMER EMPLOYEES OF UNITED STEEL WORKERS OF AMERICA, LOCALS 2391 & 3225, PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 94–02–00125

(Dated September 8, 1995)

ORDER OF REMAND

MUSGRAVE, *Judge:* Upon reading and filing defendant's consent motion for a vluntary remand and all other papers and proceedings, it it hereby

ORDERED that defendant's consent motion for a voluntary remand be and is granted, and it is further

ORDERED that this action is remanded to the Department of Labor so that it may conduct a further investigation regarding plaintiff's application for certification for trade adjustment assistance under 19 U.S.C. {{ 2271–2322, and it is further

ORDERED that:

1. Within 15 days of the date of entry of this Order, plaintiffs' counsel may submit a statement of issues and evidence to Labor for consideration in its remand investigation;

2. Within 60 days thereafter, the Department of Labor shall make its remand determination and prepare a report of its determination upon remand;

3. Within 15 days thereafter, counsel for plaintiffs may provide Labor with comments, if any, on the remand redetermination;

4. Within 20 days thereafter, Labor shall provide a response to plaintiffs' comments, if any, and forward the remand report to this Court

together with the supplemental administrative record compiled upon remand;

5. Within 20 days from receipt of notification that Labor has transmitted the report and supplemental record of its determination upon remand to the Court, the plaintiffs shall advise the Court whether they are satisfied or dissatisfied with the Labor Department's determination upon remand indicating the areas of dissatisfaction, if any; and

6. Upon receipt of notification of any dissatisfaction with Labor Department's determination upon remand, the Court will provide for an appropriate briefing schedule.

(Slip Op. 95–158)

FAG KUGELFISCHER GEORG SCHAFER KGAA, FAG CUSCINETTI S.P.A., FAG (U.K.) LTD., BARDEN CORP. (U.K.) LTD., FAG BEARINGS CORP. AND BARDEN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92–07–00487

Plaintiffs contest the Department of Commerce, International Trade Administration's ("Commerce") redetermination on remand filed pursuant to *FAG Kugelfischer Georg Schafer KGaA v. United States*, 19 CIT ___, 874 F. Supp. 1389 (1995) *("Redetermination on Remand")*, concerning Commerce's final determination in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 57 Fed. Reg. 28,360 (1992). Plaintiffs request that the Court remand this case to Commerce for a second time, directing Commerce to adopt the assessment rate methodology advocated by plaintiffs.

Held: Plaintiffs' motion is denied. Commerce's Redetermination on Remand is sustained. This case is dismissed.

[Case dismissed.]

(Dated September 14, 1995)

Grunfeld, Desiderio, Lebowitz & Silverman (Max F. Schutzman and *Andrew B. Schroth)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis,* Assistant Director); of counsel: *Lucius B. Lau* and *Thomas H. Fine,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr. Wesley K. Caine, Geert De Prest, Myron A. Brilliant and *Robert A. Weaver)* for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Joseph A. Perna, V, Larry Hampel and *J. Eric Nissley)* for defendant-intervenor, Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiffs FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti S.p.A., FAG (U.K.) Limited, Barden Corporation (U.K.)

Limited, FAG Bearings Corporation and The Barden Corporation (collectively "FAG") challenge the Department of Commerce, International Trade Administration's ("Commerce") redetermination on remand concerning Commerce's final determination in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 57 Fed. Reg. 28,360 (1992).

BACKGROUND

On June 24, 1992, Commerce published the Final Results. *See Final Results*, 57 Fed. Reg. at 28,360, as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 59,080 (1992). Commerce's Final Results stated that in exporter's sales price transactions, Commerce: (1) sampled[1] sales of FAG's antifriction bearings from Germany and Italy during the period of review ("POR"); (2) calculated the potential uncollected dumping duties ("PUDD") for each importer/exporter, based upon the difference between foreign market value and United States price; and (3) calculated an assessment rate (expressed as a percentage) for each importer/exporter by dividing that importer/exporter's PUDD by the total entered value of the reviewed sales for that importer/exporter during the POR. *Final Results*, 57 Fed. Reg. at 28,375. In the Final Results, Commerce also stated that it would direct the United States Customs Service "to assess antidumping duties by applying that percentage to the entered value of each of that importer's entries of subject merchandise under the relevant [antidumping duty] order during the review period." *Id.*

FAG challenged the Final Results claiming that Commerce should have used FAG's reported actual entered value data in calculating assessment rates. Specifically, FAG argued that Commerce should have: (1) annualized the sampled total potential uncollected dumping duties; (2) divided the resulting amount by the actual entry totals provided by FAG for the entire POR; and (3) applied the resulting assessment rate to actual POR entries to collect total PUDD. *See FAG Kugelfischer Georg Schafer KGaA v. United States*, 19 CIT ____, ____, 874 F. Supp. 1389, 1392 (1995).

On January 17, 1995, in light of FAG's record data on actual entered values and total sales of AFBs, the Court remanded the Final Results of the second administrative review with respect to ball bearings ("BBs"), cylindrical roller bearings ("CRBs") and spherical plain bearings (collectively "AFBs") from Germany and BBs and CRBs from Italy. *See FAG Kugelfischer*, 19 CIT at ____, 874 F. Supp. at 1394–95.

On April 28, 1995, Commerce released for comment a draft of the final results of its redetermination on remand *("Draft Remand Results")*.

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[1] Sampling techniques are authorized by 19 U.S.C. § 1677f–1 (1988).

On May 3, 1995, Commerce received supportive comments from The Torrington Company ("Torrington") concerning the Draft Remand Results. On May 10, 1995, Commerce received comments from FAG objecting to the Draft Remand Results as not in accordance with the Court's remand instructions.

On May 30, 1995, Commerce filed with the Court its Results on Redetermination Pursuant to Court Remand, *FAG Kugelfischer,* 19 CIT at ____, 874 F. Supp. at 1389 *("Redetermination on Remand").* In its Redetermination on Remand, Commerce concluded that no revision of the Final Results of the second administrative review of AFBs from Germany and Italy was necessary.

DISCUSSION

Commerce's final results filed pursuant to a remand will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

Assessment Rate Methodology for Entries of German- and Italian-Origin Bearings:

In *FAG Kugelfischer,* 19 CIT at ____, 874 F. Supp. at 1395, the Court directed Commerce to:

> determine whether, considering FAG's data on the record pertaining to total sales and actual entered values, its assessment rate methodology for entries of German- and Italian-origin bearings was the most accurate possible which met the needs and achieved the benefits of sampling analysis.

FAG claims that the principal and terminal deficiency in Commerce's Redetermination on Remand is that the conclusions drawn and analyses given are simply not in accordance with the strict instructions of the Court. *FAG's Comments Concerning Defendant's Final Results of Redetermination Pursuant to Court Remand ("FAG's Comments")* at 2. FAG argues that the Redetermination on Remand does not address the propriety of utilizing Commerce's methodology in a case where Commerce knows both the size of the universe from which it drew FAG's sample and the total entered value of FAG's entries during the period of review. *FAG's Comments* at 2–3.

In addition, FAG argues that Commerce's assessment rate methodology is inconsistent with the requirements of 19 U.S.C. § 1673e(a)(1) (1988). *Id.* at 5–6. FAG maintains that its proposed methodology collects the exact difference between foreign market value and United States price, the result specifically required by § 1673e(a)(1), while Commerce's methodology is arbitrary and will collect the amount required by the statute only by coincidence. *Id.* at 5–9. FAG asserts that Com-

merce does not articulate even one reason why its approach is more accurate than FAG's in actually collecting dumping duties owed. *Id.* at 4. Finally, FAG argues that its methodology meets Commerce's "sampling" needs. *Id.* at 9–10.

Torrington contends that Commerce's assessment methodology fully meets the criteria set forth by the Court and has significant advantages over the methodology proposed by FAG. *Torrington's Comments on the Final Results of Redetermination Pursuant to Court Remand; Torrington's Rebuttal Comments on the Final Results of Redetermination Pursuant to Court Remand* at 1–4.

Commerce's Redetermination on Remand states: "The Department used the same sampling methodology to calculate assessment rates in these reviews that it used in the previous reviews of the orders on antifriction bearings. This methodology has been found to be reasonable by the CIT." *Redetermination on Remand* at 2 (citing *Koyo Seiko Co. v. United States*, 16 CIT 539, 796 F. Supp. 1008 [sic] (1992))[2].

According to Commerce, it calculated duties and assessment rates based on a sample pool of sales made during the period of review as the best measure of the dumping that occurred on entries made during the POR. *Redetermination on Remand* at 3. Commerce explains that, in keeping with this approach, it "calculated duties due on the sampled sales and divided that amount by the total entered value for the sampled sales to determine the *ad valorem* (percentage) rates at which companies were dumping." *Id.* Commerce intended that these rates be applied to all unliquidated entries of subject merchandise during the POR. *Id.* Commerce states that "[t]his sampling methodology was designed to reduce the reporting burden on firms under review while ensuring an accurate basis for assessment of duties." *Id.* at 3–4.

Commerce further states:

> As FAG has pointed out, the statute requires the Department "to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise." 19 U.S.C. 1673e(a)(1). Both FAG's methodology and the Department's methodology in *AFBs II* [the Final Results] meet this standard. Both methods compute the difference between foreign market value and United States price and use that difference as the basis for assessment. FAG's method simply uses the difference to compute an amount of duties due for *sales* made during the POR, while the Department's method uses the difference to compute an amount of duties due on *entries* made during the POR. FAG's method assumes that the amount of dumping found in the sample pool is representative of the amount of dumping on sales in the POR as a whole; the Department's method assumes that the

[2] The Court assumes that Commerce intended to cite to *Koyo Seiko Co. v. United States*, 16 CIT 539, 796 F. Supp. 1526, *vacated in part on other grounds*, 16 CIT 788, 806 F. Supp. 1008 (1992). *See Defendant's Response to Plaintiffs' Comments Concerning Final Results of Redetermination Pursuant to Court Remand* at 3, 6.

ratio of dumping to entered value in the sample pool is representative of the same ratio in the POR as a whole.

Redetermination on Remand at 7–8.

Commerce concludes that the assessment rate methodology which it employed in the Final Results is reasonable, accurate, and achieves all of the practical benefits of sampling analysis. *Id.* at 10. Therefore, Commerce deems it unnecessary to revise the Final Results of the second administrative review of AFBs from Germany and Italy. *Id.*

Commerce is correct that its current methodology has been judicially approved. *See Koyo Seiko,* 16 CIT at 541–42, 796 F. Supp. at 1529. *See also GMN Georg Muller Nurenberg AG v United States,* 17 CIT 266, 268 (Apr. 20, 1993). The Court noted in *FAG Kugelfischer,* however, that *GMN* had left open a question concerning the propriety of employing Commerce's current methodology in a situation where, as here, Commerce knows both the size of the universe from which it draws its sample and the total entered value of entries during the POR. *See FAG Kugelfischer,* 19 CIT at ____, 874 F. Supp. at 1394.

The Court has reviewed Commerce's Redetermination on Remand, as well as comments submitted by the parties. A comparison of FAG's and Commerce's assessment approaches satisfactorily convinces the Court that Commerce's methodology is the more accurate in spite of the fact that Commerce was aware of FAG's data on the record pertaining to total sales and actual entered values. *See Redetermination on Remand* at 4–7.

In addition, although Commerce's and FAG's methodologies both have merit, Commerce has also persuaded the Court that implementation of FAG's methodology in this case poses certain practical problems. *See id.* at 8–9. Further, Commerce's methodology—which assumes that the dumping behavior indicated by the sample is representative of the dumping behavior overall during the POR—appears not to be biased in favor of, or against, respondents. *See id.* at 9–10. Accordingly, the Court finds that Commerce's Redetermination on Remand is in accordance with the Court's Order in *FAG Kugelfischer,* 19 CIT at ____, 874 F. Supp. at 1395.

Conclusion

The Court is satisfied that Commerce complied with the remand instruction of this Court. Therefore plaintiffs' motion is denied and Commerce's Redetermination on Remand of the Final Results is sustained. This case is dismissed.

(Slip Op. 95–159)

FIELDSTON CLOTHES, INC., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 95–08–01043

[Judgment for defendants. Action dismissed.]

(Dated September 14, 1995)

Neville, Peterson & Williams (Margaret R. Polito and *George Thompson)* for plaintiff.
Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Arthur R. Watson,* Senior Counsel, *Alicia D. Greenidge,* Attorney Advisor, Office of the Chief Counsel for International Commerce, United States Department of Commerce, of counsel, for defendants.

OPINION

RESTANI, *Judge:* This action is before the court on a motion for summary judgment made by plaintiff Fieldston Clothes, Inc. ("Fieldston") and on a motion to dismiss made by defendants United States, et al. Fieldston, an importer of Category 435 women and girls' wool coats and blazers from Honduras ("Category 435 wool garments"), challenges an import quota placed upon such merchandise by the Committee for the Implementation of Textile Agreements ("CITA"). Fieldston requests a declaratory judgment and a permanent injunction prohibiting defendants from implementing the import restriction.

BACKGROUND

Fundamentally, the Constitution grants plenary authority to Congress to regulate foreign commerce and trade with other nations. U.S. Const. art. I, § 8, cl. 3. Congress may delegate such authority to the Executive. *See, e.g., California Bankers Ass'n v. Shultz,* 416 U.S. 21, 59 (1974). Section 204 of the Agricultural Act of 1956, 7 U.S.C. § 1854 (1988), authorizes the President to negotiate agreements with foreign governments limiting the exportation of textiles and textile products to the United States and to promulgate regulations to "carry out" such agreements. That provision, in pertinent part, provides:

> The President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any * * * textiles or textile products, and the President is authorized to issue regulations governing the entry or withdrawal from warehouse of any such * * * textiles, or textile products to carry out any such agreement. In addition, if a multilateral agreement has been or shall be concluded under the authority of this section among countries accounting for a significant part of world trade in the articles with respect to which the agreement was concluded, the President may also issue, in order to carry out such an agreement, regulations governing the entry or withdrawal from warehouse of

> the same articles which are the products of countries not parties to the agreement.

7 U.S.C. § 1854. The President's authority under this section, as it pertains to the implementation of textile trade agreements, was delegated to CITA, consisting of representatives of the Departments of State, the Treasury, Commerce, Labor, and the Office of the United States Trade Representative. Exec. Order No. 11,651, § 1(a), 3 C.F.R. 676 (1971–1975), *reprinted as amended in* 7 U.S.C. § 1854 note at 950 (1994). The Executive Order further provides that the United States Customs Service must take such actions as CITA recommends "to carry out all agreements and arrangements entered into by the United States pursuant to Section 204 of the Agricultural Act of 1956 * * * with respect to entry, or withdrawal from warehouse, for consumption in the United States of textiles and textile products." Exec. Order No. 11,651, § 2(a). The Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1002 pt. 1, commonly referred to as the "Multifiber Arrangement" or "MFA," was a textile trade agreement negotiated pursuant to Section 204.

Pursuant to the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809, 4815 (1994), the MFA expired on December 31, 1994, and was succeeded by the Uruguay Round Agreement on Textiles and Clothing ("ATC"). *See* Defs.' Exs. to Mem. in Supp. Mot. to Dismiss, Ex. 1 [hereinafter "ATC"]. The ATC was approved by Congress and entered into force under the Uruguay Round Agreements Act, effective January 1, 1995, pursuant to 19 U.S.C.A. § 3511(a)–(b), (d)(4) (West Supp. 1995). *See Presidential Memorandum of December 23, 1994,* 60 Fed. Reg. 1003 (1995), *reprinted in* 19 U.S.C.A. § 3511 note at 423. The United States and Honduras are both signatories to the ATC. In conformity with the Uruguay Round Agreements Act, Congress amended the second sentence of Section 204, providing as follows:

> In addition, if a multilateral agreement, *including but not limited to the Agreement on Textiles and Clothing referred to in [19 U.S.C. § 3511(d)(4)],* has been or is concluded under the authority of this section among countries accounting for a significant part of world trade in the articles with respect to which the agreement was concluded, the President may also issue, in order to carry out such agreement, regulations governing the entry or withdrawal from warehouse of the same articles which are the products of countries not parties to the agreement, *or countries to which the United States does not apply the agreement.*

Agricultural Act of 1956 § 204, *as amended in* 7 U.S.C. § 1854 (1994) (footnote omitted) (emphasis added) [hereinafter "Section 204"].

On April 24, 1995, the United States Government, through CITA, requested consultation with the Government of Honduras with regard to Category 435 wool garments produced or manufactured in Honduras. CITA published a notice on May 23, 1995, requesting public comments on the consultation. *Request for Public Comments on Bilateral Textile Consultations on Women's and Girls' Wool Coats,* 60 Fed. Reg. 27,275

(CITA 1995). In the notice, CITA stated that if no solution was agreed upon in consultations with the Government of Honduras, CITA may later establish a limit for Category 435 wool garments produced or manufactured in Honduras and exported to the United States, at a level not less than 14,400 dozen. *Id.*

In a letter dated June 2, 1995, Fieldston submitted comments to CITA. In these comments, Fieldston claimed that the Category 435 wool garments it had contracted for production in Honduras were constructed from fabric of U.S. origin and cut into garment components in the United States.[1] Fieldston further contended that the proposed quota limit was inconsistent with import statistics from similarly situated Central American countries. Finally, Fieldston argued that the proposed limit was inconsistent with the United States' obligations under the ATC.

On July 24, 1995, CITA published a notice that no agreement was reached during consultations with the Government of Honduras. *Establishment of an Import Limit for Certain Wool Products Produced or Manufactured in Honduras,* 60 Fed. Reg. 37,880 (CITA 1995). Accordingly, CITA decided to limit imports of the subject merchandise to 14,400 dozen for the period beginning on April 24, 1995, and extending through April 23, 1996. *Id.* As authority for this action, CITA cited Section 204, the Uruguay Round Agreements Act, the ATC, and Executive Order No. 11,651. *Id.* Currently, the matter is being considered by the Textiles Monitoring Body ("TMB"), which has not issued its recommendation on this matter.[2] In this action, Fieldston challenges CITA's authority to impose a unilateral import quota upon Category 435 wool garments.

DISCUSSION

I. *Defendants' Motion to Dismiss for Lack of Jurisdiction and Standing:*

Defendants have filed a motion to dismiss Fieldston's action for lack of subject matter jurisdiction, for lack of standing, or alternatively, for failure to state a claim upon which relief may be granted. Defendants assert that subject matter jurisdiction is wanting on the grounds that Congress has precluded, under 19 U.S.C.A. § 3512(c)(1) (West Supp. 1995), any private causes of action challenging the U.S. government's actions under the Uruguay Round Agreements Act. That section, in relevant part, provides:

No person other than the United States—

> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

---

[1] Plaintiff claims that it is the largest importer of Category 435 wool garments from Honduras, and that most of the garments counted against the quota at issue were imported by plaintiff. *See* Pl.'s Resp. to Defs.' Mot. to Dismiss, Ex. A at 1.

[2] Under the ATC, the TMB, upon request by members failing to reach agreement on the restraint of exports, may examine the matter and issue recommendations as to the appropriate course of action to be taken by the members. ATC, art. 6, cl. 10, at 94.

> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, * * * on the ground that such action or inaction is inconsistent with such agreement.

Id. Defendants correctly assert that Fieldston is precluded from challenging CITA's action as inconsistent with the Uruguay Round Agreements Act or the ATC. As it pertains to plaintiff's limited challenge in this case, however, defendants' jurisdictional argument is without merit.

Here, plaintiff's challenge is limited to whether CITA's imposition of the import quota is in accordance with the congressional delegation of authority to regulate trade in textiles and textile products under Section 204. As this court has noted, "[i]t is now well established * * * that the exercise of broad discretionary authority delegated by Congress to the President in the sphere of international trade, where the President is acting essentially as an agent of Congress, is reviewable by the Courts only to determine whether the President's action falls within his delegated authority [and] whether the statutory language has been properly construed." *Florsheim Shoe Co. v. United States,* 6 CIT 1, 11, 570 F. Supp. 734, 743 (1983), *aff'd,* 744 F.2d 787 (Fed. Cir. 1984). To the extent that CITA's action is beyond the scope of the President's delegated authority under Section 204, such action is *ultra vires* and void, and properly within the jurisdictional province of the court to declare. *See B-West Imports, Inc. v. United States,* 880 F. Supp. 853, 860 (Ct. Int'l Trade 1995).

Pursuant to 28 U.S.C. § 1581(i) (1988 & Supp. V 1993), the court possesses exclusive jurisdiction over cases involving embargoes or other quantitative restrictions such as the quota at issue.[3] CITA's action under Section 204, imposing the import restrictions at issue, falls squarely within the jurisdictional purview of 28 U.S.C. § 1581(i). *See also American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States,* 751 F.2d 1239, 1244–46 (Fed. Cir. 1985) (finding section 204 "a law providing for quantitative restrictions" within language of § 1581(i)) *("AAEI-TAG").*

Defendants also assert that no final agency action has issued in this case, *see supra* note 2, and, thus, Fieldston has not exhausted its administrative remedies.[4] Assuming, *arguendo,* that action of an international body is the type of agency action to which the exhaustion doctrine applies, the court finds that there is no need to await further action by either the TMB or CITA. Whether the import restriction placed upon

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[3] Pursuant to 28 U.S.C. § 1581(i)(3), (4), the court shall have exclusive jurisdiction of any civil action commenced against the United States * * * that arises out of any law of the United States providing for—

* * * * * * *

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

Id.

[4] *See* 28 U.S.C. § 2637(d) (1988) ("The [CIT] shall, where appropriate, require the exhaustion of administrative remedies.").

plaintiff's merchandise by CITA is *ultra vires* is ripe for judicial review. *Cf. AAEI-TAG*, 751 F.2d at 1245–46 (noting that exhaustion not required under protest procedures where prospective importers challenge Customs regulations imposing import restrictions). Furthermore, when or whether this matter may be resolved through further negotiations or by the TMB is not clear. *See supra* note 2. As the quota category is nearly full, delay would be prejudicial. *See B-West Imports*, 880 F. Supp. at 858–59 (rejecting exhaustion requirement where time frame for agency deliberations of plaintiffs' applications for relief from import restrictions uncertain and exhaustion requirement would be prejudicial).

As to plaintiff's standing, Congress has provided that any civil action of which this court has jurisdiction may be commenced by "any person adversely affected or aggrieved by agency action within the meaning of [5 U.S.C. § 702]."[5] 28 U.S.C. § 2631(i) (1988). Plaintiff is a party adversely affected by CITA's import restrictions as prospective Category 435 wool garment imports by Fieldston are now unable to enter the United States. Thus, the court finds that Fieldston has standing to contest whether the quota at issue is properly within the scope of the delegation of authority set forth in Section 204.

II. *Plaintiff's Motion for Summary Judgment:*

Fieldston raises three main arguments in support of its contention that CITA is without statutory authority under Section 204 to impose a unilateral quota upon Category 435 wool garments from Honduras. First, Fieldston asserts that, under the first sentence of Section 204, the President's authority to negotiate and regulate agreements limiting exports is confined to bilateral agreements reached between the United States and a foreign government. In the absence of a bilateral agreement,[6] Fieldston reasons, an import quota may not be imposed under the first sentence of Section 204. Additionally, where a multilateral agreement, such as the ATC, is involved under the second sentence of Section 204, Fieldston contends an import quota may only be imposed (1) where the exporting country is not a member of the ATC, or (2) where the United States does not apply the ATC to the exporting country. Thus, Fieldston insists, CITA may not unilaterally impose an import quota in this case. The court disagrees.

The first sentence to Section 204 does not support the narrow construction propounded by Fieldston. Congress granted the President broad authority to "negotiate with * * * foreign governments in an effort to obtain agreements limiting the export from such countries" of textiles and textile products into the United States. 7 U.S.C. § 1854. No language in the first sentence of Section 204 restricts the President's delegated authority to the negotiation and regulation of bilateral agreements with individual foreign governments. Rather, the sentence refers to "agreements" generally, whether they be bilateral or multilateral.

[5] Section 702 of Title 5, United States Code, provides in part that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1994).

[6] Presently, no bilateral agreement exists between the United States and Honduras.

Any doubt is resolved by the second sentence of Section 204, which reads in part: "In addition, if a multilateral agreement * * * has been or is concluded *under the authority of this section* * * *." *Id.* (emphasis added). Thus, Congress intended that the President may negotiate and enforce multilateral, as well as bilateral agreements, under the first sentence to Section 204.

Contrary to Fieldston's contention, this reading of the statute does not render the modifier, "multilateral," superfluous in the second sentence of Section 204. As defendants indicate, and Fieldston notes, the principal purpose of the second sentence of Section 204 was to eliminate the possibility that countries which were not members of the World Trade Organization ("WTO")[7], or WTO members to whom the United States did not extend the benefits of the ATC, from unjustly benefitting from the specific limits on textile products to which WTO members had already agreed. Defs.' Mem. in Opp'n to Pl.'s Mot. Summ. J. at 11 n.8; Pl.'s Mot. Summ. J. at 14–15 & n.8. The court finds Section 204 sufficiently clear as not to warrant analysis under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (describing standard to be applied in reviewing agency's construction of statute that is silent or ambiguous with respect to certain issues), assuming, *arguendo*, that the principles of *Chevron* apply to this case.[8]

Second, Fieldston argues the ATC is not an "agreement" within the meaning of the first sentence of Section 204 as the ATC is not an "agreement [ ] limiting the export * * * [of] textiles or textile products." *See* 7 U.S.C. § 1854. Specifically, Fieldston contends the ATC is only a framework for negotiating agreements, envisioning the amendment and dismantling of existing quota agreements. While dismantling of quotas is clearly an ATC goal, the court disagrees with plaintiff's narrow characterization of the ATC.

Article 6 of the ATC sets forth a "transitional safeguard mechanism" under which exports may be restricted in the absence of mutual agreement between or among member countries. ATC, art. 6, at 92. Clause 8 of Article 6, for example, provides that "the level of such restraint shall be fixed at a level not lower than the actual level of exports or imports from the Member concerned during the 12-month period terminating two months preceding the month in which the request for consultation was made." *Id.*, art. 6, cl. 8, at 93. The restraint upon exportations may be maintained for up to three years without extension, or until the product is integrated into the 1994 General Agreement on Tariffs and Trade, whichever comes first. *Id.*, art. 6, cl. 12, at 94. Furthermore, the ATC permits the noticing and preservation by member countries of quantitative restrictions, within bilateral agreements or under the MFA, in effect prior to the entry into force of the WTO agreement. *Id.*, art. 2, cl. 1, at 86. Based on the foregoing, the court concludes that the ATC qualifies

[7] The World Trade Organization was established by the Uruguay Round. *See* Statement of Administrative Action, H.R. Doc. 316, vol. 1, 103d Congress, 2d Sess. 659–61 (1994) (summarizing establishment of WTO and its functions and structure).

[8] Plaintiff disputes the applicability of *Chevron*. *See* Pl.'s Mot. Summ. J. at 18–19.

as an agreement limiting the export of textiles and textile products within the meaning of Section 204.

Finally, Fieldston contends the ATC was not specifically negotiated pursuant to the President's delegated authority to negotiate and regulate textile agreements under Section 204. Although Fieldston correctly asserts that the ATC was negotiated pursuant to the Omnibus Trade and Competitiveness Act of 1988 § 1102, 19 U.S.C. § 2902 (1988 & Supp. V 1993), the court finds the ATC was also negotiated pursuant to Section 204. As previously noted, Congress amended Section 204 to include the ATC as a "multilateral agreement * * * concluded under the authority of [Section 204]." 7 U.S.C. § 1854. This evidences clear congressional intent to incorporate agreements such as the ATC within the President's broad authority to negotiate and regulate textile trade agreements under Section 204. *See Florsheim Shoe Co.*, 744 F.2d at 793 (noting that in the context of international trade, "congressional authorizations of presidential power should be given a broad construction"). This conclusion is further supported by the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, and approved by Congress.[9] The "[Uruguay Round Agreements Act] clarifies that the [ATC] constitutes a multilateral agreement for purposes of [S]ection 204." Statement of Administrative Action, H.R. Doc. No. 316, at 768. Finally, as indicated, at the outset of the transition period, quota restrictions imposed under prior bilateral agreements or the MFA and admittedly negotiated under Section 204, are maintained under the provisions of the ATC.

The remaining question addressed by the court is whether the ATC satisfies the test set forth in *AAEI-TAG* for determining whether the challenged action is *ultra vires* and beyond the delegated authority of Section 204. That is, whether the imposition of the import quota by CITA is "relevant to the enforcement of some existing textile agreement." 751 F.2d at 1247. As the ATC is an agreement limiting the export of textiles and textiles products within the meaning of Section 204, and CITA avows that the unilateral quota is imposed pursuant to rights granted by the ATC and in lieu of negotiated quotas under the ATC, the court finds CITA's action to pertain to the general subject matter of the ATC and consequently to be relevant to its enforcement.[10]

CONCLUSION

The court rejects defendants' jurisdictional challenges to Fieldston's action. CITA's imposition of the import quota upon Category 435 wool garments from Honduras is sustained as it does not exceed the broad authority granted by Congress under Section 204. Judgment herein has issued.

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[9] The Statement of Administrative Action was approved by Congress as an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements * * * in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C.A. § 3512(d) (West Supp. 1995).

[10] The court does not address Fieldston's objections to the procedural implementation of the ATC by CITA. As noted, all that is needed is that CITA's actions be relevant to the enforcement of the ATC. Further, as indicated, Congress has precluded private parties from raising such challenges before the court. *See* 19 U.S.C.A. § 3512(c)(1).

(Slip Op. 95–160)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–03–00144

Plaintiff moves pursuant to Rule 56 of the Rules of this Court for summary judgment claiming that the United States Customs Service ("Customs") assessed excessive antidumping duties. Specifically, plaintiff challenges the validity of the automatic assessment of duties pursuant to 19 C.F.R. § 353.22(e). Defendant opposes plaintiff's motion and cross-moves for summary judgment pursuant to Rule 56 of the Rules of this Court.

Held: Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment is granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (1988 & Supp. V 1993). The automatic assessment of duties pursuant to 19 C.F.R. § 353.22(e) (1990) is valid. This case is dismissed.

[Plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment is granted; judgment is entered for defendant. Case dismissed.]

(Dated September 15, 1995)

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine and *Patrick J. McDonough)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine);* of counsel: *Dean A. Pinkert,* Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rule 56 of the Rules of this Court for summary judgment on the ground that there is no genuine issue as to any material facts. Defendant cross-moves for summary judgment seeking an order dismissing this case.

Torrington challenges the assessment of antidumping duties by the United States Customs Service ("Customs"), pursuant to the instructions of the Department of Commerce, International Trade Administration ("Commerce"), on entries dating from November 9, 1988 to May 15, 1989. *See Antidumping Duty Orders and Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom ("Amended Final Results"),* 54 Fed. Reg. 20,910 (1989). This matter is presently before the Court to determine whether Customs properly assessed antidumping duties for entries made between the date of publication of the preliminary determination and the date of publication of the Final Results employing the "all others" rate. *See Preliminary Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the United Kingdom ("Preliminary Determination"),* 53 Fed. Reg. 45,312 (1988).

BACKGROUND

On April 27, 1988, Commerce initiated an antidumping duty investigation concerning ball bearings and cylindrical roller bearings and

parts thereof from the United Kingdom. *Initiation of Antidumping Duty Investigation; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the United Kingdom*, 53 Fed. Reg. 15,081 (1988).

On November 9, 1988, Commerce preliminarily determined that antifriction bearings from the United Kingdom were being, or were likely to be, sold in the United States at less than fair value. *Preliminary Determination*, 53 Fed. Reg. at 45,312. Commerce directed Customs to suspend liquidation of all entries of ball bearings and cylindrical roller bearings for the United Kingdom that were entered, or withdrawn from warehouse, for consumption on or after the date of publication of the preliminary determination. *Id.* at 45,317.

Commerce published its final determination on May 3, 1989. *Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Spherical Plain Bearings and Tapered Roller Bearings) and Parts Thereof From the United Kingdom; and Final Determination of Sales at Not Less Than Fair Value: Spherical Plain Bearings Parts Thereof From the United Kingdom ("Final Results")*, 54 Fed. Reg. 19,120 (1989). On May 15, 1989, Commerce published an antidumping order and an amended final determination. *Amended Final Results*, 54 Fed. Reg. at 20,910.

On May 8, 1990, Commerce published a notice stating that interested parties could request an administrative review with respect to the antidumping duty order for antifriction bearings from the United Kingdom. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 55 Fed. Reg. 19,093 (1990). Torrington did not request an administrative review.

Thereafter, pursuant to Commerce's instructions, Customs liquidated the merchandise entered by Torrington during the first administrative review period at rates equal to the cash deposit of estimated antidumping duties at the time of entry.

Within ninety days of each liquidation, Torrington filed protests with Customs, requesting that entries made during the period between the publication of the preliminary determination and the publication of the amended final results, November 9, 1988 to May 15, 1989, be assessed at rates listed in the amended final determination rather than the cash deposit rates in effect at the time of entry. *See* Protest numbers 1001 2–101168, 1001 2–101171, 1001 2–101177, 1001 2–102380, 1001 2–101319, 1001 2–101166, 1001 2–102381 and 1001 2–103860. *See also Plaintiff's Exhibit A.* Customs partially approved and partially denied each protest and reliquidated the entries.[1] Customs denied Torrington's claim that it was unlawful to apply preliminary antidumping rates to the challenged entries.

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[1] Customs granted Torrington's protests concerning classifications which are not an issue in the present case.

Torrington now moves pursuant to Rule 56 of the Rules of this Court for summary judgment, claiming that Customs assessed excessive antidumping duties on its entries between the publications of the preliminary determination and the amended final results. Specifically, Torrington challenges the validity of the automatic assessment of duties pursuant to 19 C.F.R § 353.22(e) (1990). Defendant opposes Torrington's motion and cross-moves for summary judgment pursuant to Rule 56 of the Rules of this Court.

DISCUSSION

On a motion for summary judgment, it is the function of the court to determine whether there remain any genuine issues of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Once the Court determines that no genuine issue of material fact exists, summary judgment is properly granted when the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987). In the case at bar, this Court finds that there are no genuine issues of material fact, the dispositive issues to be resolved are legal in nature and, therefore, summary judgment is proper.

1. *Jurisdiction:*

Torrington contends that this Court's jurisdiction is derived from 28 U.S.C. § 1581(a) (1988) and, in the alternative, 28 U.S.C. § 1581(i) (1988 & Supp. V 1993). *Statement of Material Facts as to Which Plaintiff Contends There is No Genuine Issue to be Tried* at 1. Torrington argues that 19 U.S.C. § 1514(a) (1988 & Supp. V 1993) gives importers the right to protest the decision of a customs officer concerning the assessments of liquidated antidumping duties imposed under automatic assessment procedures. *Plaintiff's (a) Response to Defendant's Cross-Motion for Summary Judgment and (b) Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Plaintiff's Reply Brief")* at 11. Torrington contends that the language in 19 U.S.C. § 1514(a) referring to the right to protest the decisions of a customs officer "including the legality of all orders and findings entering into the same as to, *inter alia*, the amount of duties chargeable" supports its position. *Plaintiff's Reply Brief* at 11. *See also* 19 U.S.C. § 1514(a). Torrington maintains that since the automatic assessment procedure under 19 C.F.R. § 353.22(e) does not provide for review under 19 U.S.C. § 1581(c) (1988) because there was no administrative review by Commerce, § 1581(a) is a proper basis of jurisdiction. *Memorandum of The Torrington Company, Plaintiff, in Support of Motion for Summary Judgment ("Plaintiff's Brief")* at 22–23.

Torrington cites 28 U.S.C. § 1581(i) as an alternative basis of jurisdiction. *Plaintiff's Brief* at 23–24.

Commerce concedes that this Court has jurisdiction pursuant to 28 U.S.C. § 1581(i), but maintains that this Court does not have jurisdiction under 28 U.S.C. § 1581(a). *Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Brief")* at 6. Commerce claims that in order for the Court

to possess jurisdiction pursuant to 28 U.S.C. § 1581(a), the issues raised must be properly protestable. *Defendant's Brief* at 7. According to Commerce, the calculation of antidumping duties is not within the province of Customs and, therefore, is not properly protestable. *Id.*

Commerce claims that the Court of Appeals for the Federal Circuit ("CAFC") in *Nichimen America, Inc. v. United States,* 938 F.2d 1286 (Fed. Cir. 1991), interpreted the Trade Agreements Act of 1979 ("1979 Act") to establish a procedure whereby Commerce is charged with the final calculation and assessment of antidumping duties. *Defendant's Brief* at 7–9. According to Commerce, § 751 of the 1979 Act, codified at 19 U.S.C. § 1675 (1988), established that antidumping determinations would be reviewed through an administrative review process by Commerce, rather than through administrative protests to Customs. *Defendant's Brief* at 8. Commerce maintains that Torrington's failure to request an administrative review precludes a proceeding under 28 U.S.C. § 1581(a). *Id.* at 9.

Commerce further contends that Torrington may not use 19 U.S.C. § 1514(a) to contest a regulation promulgated by Commerce. *Id.* at 10. Commerce interprets 19 U.S.C. § 1514(a) to permit protests of decisions of "customs officer[s]" only. *Id.*

Section 1581 of Title 28, United States Code, provides: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." Section 515 of the Tariff Act of 1930 corresponds to 19 U.S.C. § 1515 (1988 & Supp. V 1993) which requires Customs to issue a decision granting or denying a protest filed under 19 U.S.C. § 1514. Section 1514(a) of Title 19, United States Code, enumerates the decisions of Customs which are subject to protest as follows:

> [D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
> (2) the classification and rate and amount of duties chargeable;
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
> (6) the refusal to pay a claim for drawback; or
> (7) the refusal to reliquidate an entry under section 1520(c) of this title;
>
> shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section, or unless a civil action con-

> testing the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *.

Torrington relies on 19 U.S.C. § 1514(a)(2) to support its claim that Customs' assessments pursuant to 19 C.F.R. § 353.22(e) are subject to protest. Section 353.22(e) permits automatic assessment of duties as follows:

> (1) For orders, if the Secretary does not receive a timely request under paragraph (a)(1), (a)(2), or (a)(3) of this section, the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise described in paragraph (b) of this section at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposits previously ordered.

19 C.F.R. § 353.22(e) (1990). Paragraph (a) refers to requests for administrative reviews pursuant to 19 U.S.C. § 1516a (1988 & Supp. V 1993). Thus, if an importer does not request an administrative review, Customs automatically assesses antidumping duties.

This Court agrees with Commerce that the assessment of antidumping duties are not properly protestable under 19 U.S.C. § 1514(a). In *Mitsubishi Elecs. America, Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994), the CAFC rejected Mitsubishi's argument that this court had jurisdiction under 28 U.S.C. § 1581(a) to hear Mitsubishi's protest challenging the application of the automatic assessment provision where no administrative review was requested. The CAFC determined that 19 U.S.C. § 1514(a) applies exclusively to decisions made by Customs. *Mitsubishi*, 44 F.3d at 976. Concluding that the assessment and collection of antidumping duties is based on decisions by Commerce, not Customs, the CAFC stated the following:

> Customs merely follows Commerce's instructions in assessing and collecting duties. Customs does not determine the "rate and amount" of antidumping duties under 19 U.S.C. § 1514(a)(2). Customs only applies antidumping rates determined by Commerce. Further, Customs has merely a ministerial role in liquidating antidumping duties under 19 U.S.C. § 1514(a)(5).
>
> In sum, title 19 makes clear that Customs does not make any section 1514 antidumping "decisions." Customs actions regarding dumping do not fall within 19 U.S.C. § 1514(a). Thus, without a decision under section 1514(a), the trial court correctly determined that it lacked jurisdiction under section 1581(a).

Id. at 977 (citations omitted).

Accordingly, this Court finds that it does not have jurisdiction under 28 U.S.C. § 1581(a). However, as conceded by both parties, this Court

has jurisdiction pursuant to 28 U.S.C. § 1581(i).[2] Title 28, United States Code, section 1581(i) is the appropriate basis of jurisdiction because Torrington could not invoke the remedies contained in § 1581 (a)–(h). *See Mitsubishi*, 44 F.3d at 977. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1581(i).

2. *Assessment of Antidumping Duties:*

Torrington claims that Customs' assessment of antidumping duties based on Commerce's preliminary determinations, pursuant to 19 C.F.R. § 353.22(e), is inconsistent with the antidumping duty statute. *Plaintiff's Brief* at 8–11. Torrington's contention is based upon 19 U.S.C. §§ 1673 and 1673e (1988) which require customs officers to assess and impose an antidumping duty on merchandise equal to "*the amount* by which the foreign market value" exceeds the United States price. *Plaintiff's Brief* at 9 (emphasis supplied). Torrington interprets "the amount" to mean the rate determined in final determinations which, according to Torrington, is more reliable than the preliminary rate. *Plaintiff's Brief* at 9–10.

In the alternative, Torrington asserts that 19 C.F.R. § 353.22(e) conflicts with the "refund" clause in 19 U.S.C. § 1673f(a)(2) (1988 & Supp. V 1993). *Plaintiff's Brief* at 16. Torrington contends that this section requires that duties be assessed at the lower of the preliminary or the final dumping rates where security is posted for entries made during the period between Commerce's preliminary determination and the issuance of the antidumping duty order. *Plaintiff's Brief* at 16–17. Torrington asserts that 19 C.F.R. § 353.22(e) conflicts with § 1673f(a)(2) by requiring assessments in amounts equal to the security posted at the time of entry when an administrative review is not requested. *Id.* at 17.

Torrington also contends that the challenged regulation conflicts with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("GATT") (1979). *Id.* at 11–15. Specifically, Torrington claims that, with one exception that is not relevant here, Article 8 of the GATT[3] permits the assessment of antidumping

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[2] 28 U.S.C. § 1581(i) (1988 & Supp. V 1993) states:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenues;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

[3] Article 8 of the GATT, titled "Imposition and Collection of Anti-dumping Duties," states in pertinent part:

> 1. The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory.
>
> * * * * * * *
>
> 3. The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

duties only upon the completion of all administrative procedures. *Id.* at 12–13.

Torrington claims that the challenged regulation also contradicts Article 11(1) of the GATT[4] which regulates retroactive assessments. *Id.* at 14. Torrington asserts that retroactive duties are only permitted in limited situations which are not applicable in the present case. *Id.* at 14–15.

Torrington asserts that this Court should give effect to the GATT. *Id.* at 15–16. Torrington argues that Congress intended to implement the GATT when it enacted the 1979 Act. *Id.* at 15. Furthermore, Torrington maintains that statutes must be construed harmoniously with international agreements when such a construction is possible. *Id.* at 15–16. Torrington concludes that Commerce does not have the authority to enact a regulation that conflicts with either the antidumping duty statute or the GATT. *Id.* at 17–19.

Finally, Torrington rejects Commerce's construction of the antidumping duty statute as conflicting with the requirements of due process. *Plaintiff's Reply Brief* at 10–11. According to Torrington, assessments based on preliminary rates reached prior to statutory hearings unfairly deny due process of law. *Id.* at 10.

In rebuttal, Commerce asserts that 19 C.F.R. § 353.22(e) comports with both the antidumping duty statute and the GATT. Commerce argues "the amount" in 19 U.S.C. §§ 1673 and 1673e does not refer to the final less than fair value ("LTFV") determination but, instead, refers to the *actual* margin of dumping determined during an administrative review pursuant to 19 U.S.C. § 1675. *Defendant's Brief* at 11 (emphasis supplied). Commerce contends that 19 U.S.C. § 1673 does not specify the manner in which the actual antidumping margins are to be determined. *Id.* at 11–12. According to Commerce, the completion of an antidumping duty investigation subjects the investigated class or kind of merchandise to the eventual imposition of antidumping duties, and establishes a cash deposit rate for the deposit of estimated antidumping duties upon future imports. *Id.* at 13. Commerce explains that the final assessment of antidumping duties is accomplished pursuant to an administrative review of merchandise subject to the antidumping duty order under 19 U.S.C. § 1675. *Id.* at 13–14.

Commerce further asserts that 19 U.S.C. § 1675 does not specify the manner in which Commerce is to determine the amount of antidumping duties to be assessed when no administrative review is requested. *Id.* at 14–15. Commerce maintains that Congress left it to Commerce's discre-

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[4] Article 11(1) of the GATT, titled "Retroactivity," states:

> 1. Anti-dumping duties and provisional measures shall be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 8 [permitting the imposition of anti-dumping duties] and paragraph 1 of Article 10 [permitting provisional measures], respectively, enters into force, except that in cases:
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> * * * * * * *
>
> If the anti-dumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

tion to provide, by regulation, for duty assessment upon entries for which no review is requested. Commerce cites the following passage from the legislative history of 19 U.S.C. § 1675 to support this assertion:

> The Conferees agreed to the House provision. Item 17(a) is designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority. *The committee intends the administering authority should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested,* including the elimination of suspension of liquidation, and/or the conversion of cash deposits of estimated duties, previously ordered.

H.R. Conf. Rep. No. 3398, 98th Cong., 2d Sess. at 181 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4910, 5298 (emphasis added). Commerce contends that 19 C.F.R. § 353.22(e) was passed in response to the above congressional request. *Defendant's Brief* at 15. Commerce suggests that the challenged regulation is a reasonable means of accomplishing the assessment of duties upon entries for which an administrative review has not been requested. *Id.* at 16.

Commerce concedes that the rates calculated in the amended final results may be a more accurate calculation of the dumping margins for the period of investigation than the rates from the preliminary determination. *Id.* Commerce maintains, however, that the rates from the amended final results may not accurately reflect the actual dumping margins during the first administrative review period. *Id.* Commerce explains that in the case at bar, Commerce originally investigated a period from October 1, 1987 to March 31, 1988 rather than reviewing entries during the period from November 9, 1988 to May 15, 1989 about which Torrington complains. *Id.* at 16–17. Accordingly, Commerce contends that the dumping margins determined in the amended final results do not reflect the actual dumping margins for entries made during the period from November 9, 1988 to May 15, 1989. *Id.* at 17.

Commerce also contends that the challenged regulation does not conflict with 19 U.S.C. § 1673f(a)(2). Commerce argues that the plain language of this section mandates the refund of cash deposits only when the amount deposited as estimated duties is greater than the amount ultimately assessed as antidumping duties. *Id.* at 17–18. Commerce emphasizes that under the automatic assessment regulation, duties are always assessed in an amount equal to the deposit rates at the time of entry and, therefore, no refund of estimated duties is required under 19 U.S.C. § 1673f(a)(2). *Id.* at 18.

Commerce maintains that the automatic assessment regulation was promulgated pursuant to Commerce's statutory authority. *Id.* at 18–19. In addition, Commerce emphasizes that Torrington knew the deposit requirements of the preliminary determination when it entered merchandise into the United States and could have requested an administrative review. *Id.* at 19–20.

In response to Torrington's due process claim, Commerce argues that 19 C.F.R. § 353.22(e) comports with due process requirements because importers have an opportunity to request an administrative review. *Defendant's Reply Memorandum in Support of its Cross-Motion for Summary Judgment ("Defendant's Reply Brief")* at 6–7.

Finally, Commerce claims that this Court need not consider the GATT as long as the regulation does not conflict with domestic regulation. *Defendant's Brief* at 20. Commerce further responds by asserting that the automatic assessment regulation does not conflict with the GATT. *Id.* at 20–24. Commerce argues that Article 8 of the GATT is not applicable because it refers to the "actual dumping margin" which was never determined in the present case due to Torrington's failure to request an administrative review. *Id.* at 22. Similarly, Commerce argues that Article 11 of the GATT is not applicable because the "duty fixed in the final decision" refers to the duty assessed at the end of an administrative review rather than the deposit rate listed in the final determination of an LTFV investigation. *Id.* at 22–23.

This Court disagrees with Torrington's interpretation of the antidumping duty statute. A brief description of the statutory scheme is necessary to explain why Torrington's interpretation is without merit. Section 1673 of Title 19, United States Code, sets forth the general proposition that when Commerce determines that foreign merchandise is being sold in the United States at less than its fair value and an industry in the United States is injured or threatened with injury as a result, Commerce may impose an antidumping duty "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." 19 U.S.C. § 1673. The procedure for determining antidumping duties is established by 19 U.S.C. § 1673a (1988) and subsequent sections. Pursuant to the procedure set out in the statute, usually 160 days after the filing of a petition, Commerce makes a preliminary determination which includes the estimated average amount by which the foreign market value exceeds the United States price. 19 U.S.C. § 1673b(b)(1)(A) (1988). If there is an affirmative preliminary determination, Commerce orders both the suspension of liquidation of all entries of merchandise subject to the determination, and the posting of a cash deposit, bond, or other appropriate security for each entry of the merchandise covered equal to the estimated average amount by which the foreign market value exceeds the United States price. 19 U.S.C. § 1673b(d)(1) & (2) (1988). Generally, within seventy-five days of the preliminary determination, Commerce makes a final determination. 19 U.S.C. § 1673d(a)(1) (1988). If the final determination is affirmative, Commerce continues the suspension of liquidation and the collection of cash deposits or other security. 19 U.S.C. § 1673d(c)(4)(A) (1988). In addition, after a final determination, Commerce orders Customs "to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds

the United States price of the merchandise." 19 U.S.C. § 1673e(a)(1) (1988).

Pursuant to 19 U.S.C. § 1675, an interested party may request an administrative review of the amount of duty assessed. Title 19, United States Code § 1675 provides:

> **(a) Periodic review of amount of duty**
>
> **(1) In general**
>
> At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order * * * the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—
>
> * * * * * * *
>
> (B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty * * *
>
> * * * * * * *
>
> and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.
>
> **(2) Determination of antidumping duties**
>
> For the purpose of paragraph (1)(B), the administering authority shall determine—
>
> (A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and
>
> (B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.
>
> The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and *that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.*

(Emphasis added).

In the present case, Torrington did not request an administrative review. This Court agrees with Commerce that 19 U.S.C. § 1675 does not determine the amount of antidumping duties to be assessed when no administrative review is requested. The plain language of the statute does not indicate a method for assessing antidumping duties when no administrative review is requested. The legislative history of this provision, however, clearly required Commerce to promulgate a regulation for the assessment of antidumping duties on entries for which no review is requested. Congress, at least implicitly, has delegated authority to Commerce to clarify a portion of the statute by regulation. This Court, therefore, "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*

Inc., 467 U.S. 837, 844 (1983). Thus, this Court must defer to Commerce's interpretation of the statute as long as it is reasonable.

Torrington takes a few phrases from several sections of the antidumping duty statute out of context and ignores the overall structure of the statutory scheme. Torrington's construction would require this Court to find that the definition of a dumping margin is different in 19 U.S.C. § 1673 than it is in 19 U.S.C. § 1675. According to Torrington, "the amount by which the foreign market value exceeds the United States price," for purposes of 19 U.S.C. § 1673 means the amount as determined in the final determination of the LTFV investigation. However, under Torrington's analysis, "the amount * * * by which foreign market value * * * exceeds the United States price" referred to in 19 U.S.C. § 1675, means the amount determined at the end of a § 751 review. There is no evidence supporting Torrington's assertion that Congress intended identical wording within the same statute to have different meanings.

Furthermore, 19 U.S.C. § 1673f(a)(2) does not support Torrington's contentions. 19 U.S.C. § 1673f(a)(2) states:

> If the amount of a cash deposit collected as security for an estimated antidumping duty under section 1673b(d)(2) of this title [requiring the deposit of security after an affirmative preliminary determination of sales at less than fair value] is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title [concerning the final assessment of duties], then the difference for entries of merchandise entered * * * before notice of the affirmative determination of the Commission under section 1673d(b) of this title is published shall be—
>
> * * * * * * *
>
> (2) refunded, to the extent the cash deposit is higher than the duty under the order.

19 U.S.C. § 1673f(a)(2). The plain language supports Commerce's interpretation of this provision that a refund is only necessary if the deposit for an estimated duty is greater than the amount ultimately assessed at the time of entry. The deposit rates assessed for the entries in question were the rates listed in the preliminary determination. The duties ultimately assessed on the same entries were equal to the deposit rates. This does not fully resolve the issue, however, and Torrington is correct in its assertion that it is circular for Commerce to argue that the regulation is valid because duties are assessed at a rate equal to the deposit rate without first determining whether use of the deposit rate of the preliminary determination is proper. *Plaintiff's Reply Brief* at 8–9. This Court finds, however, that the preliminarily determined rates are a proper basis for assessing antidumping duties for entries made between publication of the preliminary and final determinations. Commerce's regulation need only be a reasonable interpretation of the statute. There is nothing in the antidumping duty statute that precludes Commerce from using the

preliminary rates when no review is requested. On the contrary, as discussed above, the structure of the statute supports Commerce's actions.

In addition, an administrative review in this case would have covered entries during the period from the date of suspension of liquidation (the date of the preliminary determination in this case) to the end of the month immediately preceding the first anniversary month of the publication of the antidumping duty order. 19 C.F.R. § 353.22(b)(2) (1990). As discussed above, administrative reviews are only available upon request pursuant to 19 U.S.C. § 1675, and Congress has left it to Commerce's discretion to determine assessments when no administrative review is requested. If Torrington did not want the preliminary rates to apply, it could have requested an administrative review. This Court is inclined to agree with Commerce that Torrington wanted to avoid a review of the entries assessed at the amended final results at rates significantly lower than the preliminary rates. The rates assessed in the amended final results for ball bearings and cylindrical roller bearings were 54.27% and 43.36%, respectively. *Amended Final Results*, 54 Fed. Reg. at 20,910–11. These rates were significantly lower than the preliminary rates for ball bearings and cylindrical roller bearings which were 131.86% and 45.56%, respectively. *Preliminary Determination*, 53 Fed. Reg. at 45,318. Torrington chose not to request an administrative review knowing that the automatic assessment regulation would apply requiring Commerce to assess antidumping duties at a rate equal to the estimated duty deposit rate at the time of entry. This Court has refused to permit relief for importers harmed by their own decisions. *See Federal-Mogul Corp. v. United States*, 16 CIT 893, 895–96 (1992) (denying a modification of a preliminary injunction to release cash deposits of estimated antidumping duties).

In light of the above, this Court also finds that there is no merit to Torrington's claim that it was denied due process. A full administrative process pursuant to 19 U.S.C. § 1675 was available to Torrington if it chose to request a review. Commerce had published a notice regarding this option on May 8, 1990. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 55 Fed. Reg. 19,093 (1990).

This Court's finding that Commerce's construction of the antidumping duty statute is reasonable eliminates any need to discuss Torrington's assertion that the challenged regulation conflicts with the GATT. In *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667–68 (Fed Cir. 1992), the CAFC rejected the plaintiff's argument that the statutory provisions of the antidumping duty statute and countervailing duty statue should be interpreted consistent with the GATT. The CAFC stated:

> [E]ven if we were convinced that Commerce's interpretation conflicts with the GATT, which we are not, the GATT is not controlling. While we acknowledge Congress's interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Con-

> gress in fact did. The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy.

Suramerica, 966 F.2d at 667–68 (citations omitted). Following this reasoning, this Court need not consider whether the challenged regulation conflicts with the GATT since this Court finds that Commerce's interpretation of the antidumping duty statute was reasonable.

CONCLUSION

In accordance with the foregoing opinion, this Court after due deliberation and a review of all papers in this action, finds that the automatic assessment of duties pursuant to 19 C.F.R. § 353.22(e) is valid. For the reasons stated above, judgment is hereby entered for the defendant. This case is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/65 9/13/95 Goldberg, J.	Traveler Trading co.	94–11–00702	6114.30.30, 6211.33.00, 6211.43.00, or 6505.90.80 Rate of duty in effect at the time of entry	9505.90.60 3.1%	Agreed statement of facts	Newark Costumes of flimsy construction
C95/66 9/13/95 Goldberg, J.	Kendall Healthcare Products	93–01–00025	4015.19.10 Duty free	4015.19.10 Duty free	Agreed statement of facts	Atlanta Latex gloves
C95/67 9/14/95 Musgrave, J.	ACPC Inc.	92–02–00115	7614.10.10 4.9% 7614.90.10 4.9%	A7614.10.5000 Duty free A7614.90.5000 Duty free	Agreed statement of facts	Mobile Electrical conductors

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Index

Customs Bulletin and Decisions
Vol. 29, No. 40, October 4, 1995

U.S. Customs Service

Treasury Decisions

General Notices

CUSTOMS RULINGS LETTERS

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

U.S. G.P.O. 1995–387–567–00058